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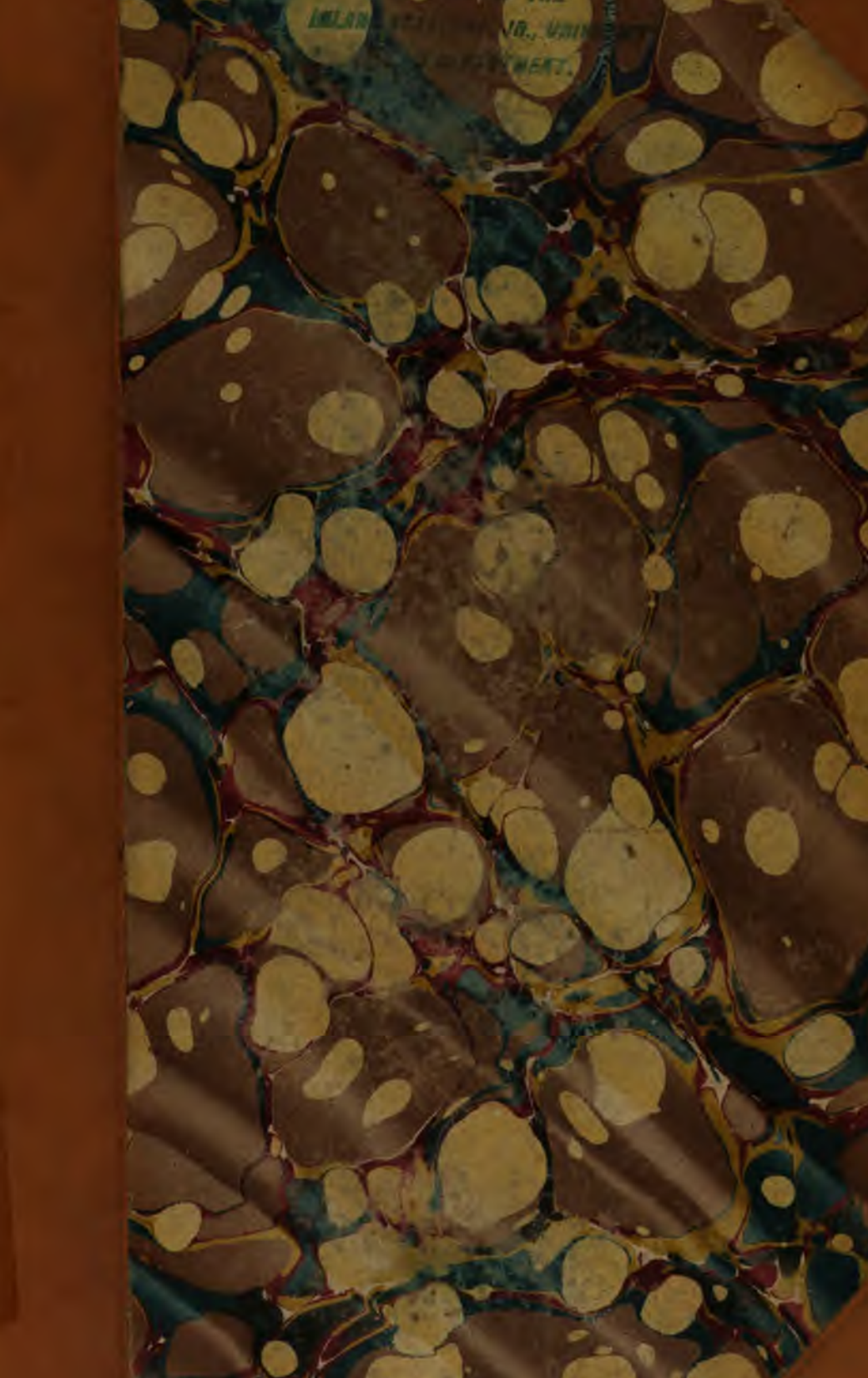

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REPORTS OF CASES

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AND IN THE

MASTER'S OFFICE,

AND OTHER DECISIONS AFFECTING POINTS OF PRACTICE,

BY

C. W. COOPER, BARRISTER,
REPORTER.

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THE HON. J. GODFREY SPRAGGE, *Chancellor.*

" " O. MOWAT, *Vice-Chancellor.*

" " S. H. STRONG, *Vice-Chancellor.*

T. W. TAYLOR, ESQ. { *Judge's Secretary.* / *Referee in Chambers.*

Minister of Justice, Dominion of Canada.

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REPORTS OF CASES

DECIDED IN

CHANCERY CHAMBERS,

AND OTHER DECISIONS AFFECTING POINTS OF PRACTICE.

SLATER v. SLATER.

Administration suit—Statute 29 Vic. ch. 28, sec. 33.

Section 33 of the Act to amend the Law of Property and Trusts, 29 Vic. ch. 28, which enacts that any person, after 31st December, 1865, dying seised of land charged with the payment of any sum of money by way of mortgage, the heir or devisee shall not be entitled to have the mortgage debt discharged out of the personal estate: *Held*, not to apply to cases where the land is charged with the performance of an obligation other than the payment of money.

In a case such as suggested where the statute was held not to apply:—It was considered no bar to the chargee's right to be paid out of the personal estate of the intestate, that he was himself also heir-at-law of the intestate.

***Held*, that a suit against an administrator by a person entitled to a legacy or distributive share of the estate cannot be brought before the expiry of a year after the death of the intestate.**

Jan., 1870.

Statement.

This was a motion for an administration order. The applicant, *Christopher Slater*, was the father of the deceased, *Stephen Slater*, and claimed to be a creditor on the estate of his son, and entitled to a distribution share of the personal estate. *Stephen Slater* died on the 27th March, 1869, without any child: his widow, the present defendant, became his administratrix. The applicant's claim as creditor was based on the following facts: About two years before the death of *Stephen Slater*, the applicant conveyed to him a farm, in

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part consideration for which *Stephen* executed a covenant in which he agreed to support and maintain the applicant and his wife during their joint lives, and the life of the survivor, and to supply them with what money they might require to spend. This covenant was expressly charged on the land in question by way of security. Stephen died about two years after the transaction, and the applicant again became possessed of the land, as the heir-at-law of *Stephen*, and brought an action of ejectment against *Stephen's* widow to recover the land. It was alleged that since the death of *Stephen*, the defendant, as administratrix, had neglected and refused to support and maintain the applicant and his wife, and he claimed to be a creditor under the covenant of *Stephen*, seeking to recover in respect of the maintenance accruing since the death of *Stephen*. Less than a year had elapsed since the death of *Stephen* to the time of the motion.

Argument.

Mr. *S. H. Blake*, in support of the motion, submitted he was entitled to the usual administration order, on the ground of his client being a creditor, and on the ground of his being entitled to a distribution share of the personal estate.

Mr. *T. H. Spenser*, contra, contended—

1. So far as the motion is based on the applicant's right to a distribution of the estate, a year has not elapsed since the death of the intestate, and on this ground the application is premature, and should fail (*a*).

2. As to the applicant's claim as a creditor, it is submitted, that according to his own case he is not a creditor, the covenant being charged on the land, and the applicant afterwards taking the land as heir-at-law of the covenantor, the charge and covenant have become distinguished, in equity especially as the covenant was part of the consideration given

(*a*) 22 & 23 Chas. II., ch. 10, sec. 8; Cole v. Glover, 16 Grant.

for the land: *Donisthorpe* v. *Porter* (*a*), *Lord Selsey* v. *Lord Lake* (*b*), *Astley* v. *Mills* (*c*), *Price* v. *Gibson* (*d*), *Chester* v. *Willes* (*e*), *Duke of Chandos* v. *Talbot* (*f*), *Higgins* v. *Shaw* (*g*). But if the covenant still exists, the land on which it is charged is primarily liable to satisfy it; and the statute 29 Vic. ch. 28, sec. 33 applies. This section is the same as the English Act, on the same subject: 17 & 18 Vic. ch. 113, which has been held to extend to equitable mortgages: *Pembrooke* v. *Friend* (*h*). It is submitted that the act applies to all incumbrances on land expressly created by contract (*i*). 1870. Slater v. Slater.

Mr. *Blake*, in reply.

The case of *Hood* v. *Hood*, cited on the other side, shews that a vendor's lien was not within the 17 & 18 Vic. and is in the applicant's favour. This covenant is neither a legal nor equitable mortgage, and is not within the act.

As to the question of extinguishment or merger, there is no merger, as it would be contrary to the intention, and to the prejudice of the covenantee. The questions raised are proper to be discussed in the Master's office, and the applicant has a right to have his claim adjudicated upon there in in the first instance.

SPRAGGE, C.—This is an application for an administration order. The applicant or plaintiff is the father of the intestate. The defendant is the widow of the intestate, who died without issue. The plaintiff comes into court in two characters: as entitled to a share of the estate of the intestate, and as a creditor. The defendant denies that he has any *locus standi* in court in either character: and alleges that he is at least premature in instituting a suit for a dis- Judgment.

(*a*) 2 Eden, 162. (*b*) 1 Beav. 146. (*c*) 1 Sim. 298.
(*d*) 2 Eden, 115. (*e*) Amb. 246. (*f*) 2 P. W. 604.
(*g*) 2 Dr. & War. 356. (*h*) 1 J. & H. 132. (*i*) See Hood v. Hood, 3 Jur. N. S. 684; Imperial Act, 30 & 31 Vic. ch. 69, sec 2.

1870. tributive share of the intestate's estate before the lapse of a year from the intestate's death: and that he is not a creditor.

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The intestate died on the 27th of May, 1869, and a year had not elapsed, when these proceedings were taken, and in fact has not elapsed yet. The plaintiff's counsel contend that although the estate is not distributable, until the lapse of a year, still parties entitled to a distributive share are entitled in the meantime to call the personal representative to account in this court.

By our statute, 33 Geo. III., ch. 8, following the English Statute of Distributions, it is provided, "to the end that a due regard be had to creditors; that no such distribution of the goods of any person dying intestate be made until after one year be fully expired after the intestate's death;" and by analogy to the English statute, and the practice in the Ecclesiastical Courts, the courts in England have fixed the same time as the period before which legacies are not payable. The reason given for this in Mr. Justice *Williams's* book, 6th ed. p. 1286, is, that during the year it is presumed that the executor may fully inform himself of the state of the property; and Lord *Redesdale*, in *Pearson* v. *Pearson* (*a*), says, that the rule as to legacies is taken from the practice in the Ecclesiastical Courts where he says, "a year is given to the executor to collect the effects," and he adds "and he cannot be called upon to pay before that time, because" and this I think shews his meaning to be that he cannot be called upon by suit or otherwise before that time, "because he cannot know until then what fund there is to pay." Lord Hardwicke, in *Beckford* v. *Tobin* (*b*), is still more explicit. He says the Ecclesiastical Courts "gave the executor a year to get in the estate before he should be compelled to give an account," adding that the Court of Chancery had followed that rule.

Judgment.

Similar language has been held in other cases, the occa-

(*a*) 11 S. & L. 11. (*b*) 1 Ves. Sen. 310.

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sion for it having arisen out of questions as to the time from which legacies should bear interest. I have not met with any case in which a bill has been filed before the expiry of the year; and this appears to shew the understanding of the profession that a bill cannot be filed before that time. I am told, indeed, that there was a case, *In re Anderson*, before the late Vice Chancellor, in which the contrary was held. I am disposed to pay the utmost respect to the decisions of that excellent judge, but I am not told where it is to be found, or when it was decided. I do not know whether the question was raised; and I cannot, in the absence of all information upon these points, say that the point in question was decided.

Not only is the language of Lords *Redesdale* and *Hardwicke*, especially of the latter, against an executor, and *pari ratione* of an administrator, being liable to be called to account before the expiry of the year, but the reason of the thing is also against it. If he may be called upon before that time, he may be called upon, a month, or a week, after the death of the testator or intestate; and it would be in the power of a party entitled to a legacy, or a distributive share, to institute a suit for its recovery before the time allowed by the law for the personal representative to "inform himself of the state of the property," and to ascertain "what fund there is to pay." Before that time the personal representative would find himself in the Master's office. There is an anomaly in all this, and practical difficulties in the accounting would be found to exist; and there is also an anomaly in a person being permitted to institute a suit for the recovery of that, which at the time of its institution, is not yet payable to him. I think, therefore, that both reason and authority are against the institution of a suit against an administrator by a person, entitled to a distributive share, before the expiry of a year after the death of the intestate.

Judgment.

The claim of the plaintiff as a creditor is founded upon this. On the 16th of March, 1866, he conveyed to his son,

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the intestate, certain real estate; and by indenture of the same date, between the son of the first part, and his father and his father's wife of the second part, the son in consideration of the conveyance to him, and of $1, covenanted for the maintenance of his father and wife and of the survivor of them; and for the payment of such money as they might need; and the indenture contains the following, "and the said party of the first part (the son) for himself, his heirs, and assigns, doth hereby *bind* and *charge* the said lands, being composed of (describing them) with the support and maintenance of the said parties of the second part as aforesaid; and with the performance of all the covenants and agreements of the said party of the first part," &c.

The plaintiff's case is, that since the death of his son; the administratrix, his son's widow, has ceased and refused to support him; and he claims as a creditor upon his said estate, in respect of the covenant for maintenance, and to have the same performed by the administratrix out of the personal estate. The land conveyed to the son and in consideration of which the covenant for maintenance was entered into, and which is charged with the performance of the covenant, is inherited by the plaintiff as heir-at-law of his son.

Judgment.

The defendant's contention is that the case comes within the 29 of the Queen, ch. 28. Section 33 enacts that when after the 31st of December, 1865, any person shall die seised of or entitled to any estate or interest in land, which at the time of his death "shall be charged with the payment of any sum or sums of money by way of mortgage," in the absence of any contrary intention expressed by will or other document, the heir or devisee shall not be entitled to have the mortgage debt discharged out of the personal estate; but the lands charged shall, as between the different persons claiming under the testator or intestate, be primarily liable to satisfy the charge.

It is a peculiarity in this case, that the incumbrancer is

also the heir-at-law, a case in which the statute should apply *a fortiori* if it applies at all. The first question, however, is whether it applies at all, and upon this two questions arise; whether in the form in which it is, it is a mortgage, the statute requiring that the land should be charged by way of mortgage; and next whether the land not being charged in terms with the payment of money, but with the maintenance of the chargees (with an exception which I will notice presently) it comes within the act.

I do not think that the form of the charge creates any serious difficulty. I think it is a mortgage within the meaning of the act. The definition of a mortgage by Mr. *Coote*, and Mr. *Fisher* are in its favor; and so are cases which I have seen upon the subject. I may mention among them the case of Sir *Simeon Stewart*, referred to in *Burn* v. *Burn* (*a*), and in *Card* v. *Jaffary* (*b*), and in the case of *Metcalf* v. *The Archbishop of York* (*c*). If the son had only covenanted to charge the land, it would have operated as a charge in equity, and have entitled the covenantee to a formal mortgage. Here he has in terms charged the land and thereby conveyed an interest in it, to the chargees. An equitable mortgage is within the act: *Pembrooke* v. *Friend* (*d*). And I cannot say that I entertain any serious doubt that the charge in question is so.

Judgment.

But upon the other branch of the question I feel more difficulty. There may be no good reason why the provision of the act should not apply where land is charged with the performance of an obligation, other than the payment of money, or with the performance of any other duty; as well as when it is charged with the payment of money simply. The general principle of the provision is that the heir or devisee shall take the land with its burthen: and I confess I fail to see any sound reason why

(*a*) 3 Ves. 576.
(*b*) 2 S. & L. 381.
(*c*) 1 M. & C. 547.
(*d*) 1 J. & H. 132.

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the burthen should be thrown upon the personal estate, when the duty or obligation to be discharged is something else than the payment of money; while the burthen goes with the land when it consists in the payment of money. Still there are the explicit words of the act, changing the law in terms only, where the land has been "charged with the payment of any sum or sums of money." This is the language of the English act as well as of ours; and I find no case in which the point in question has arisen. The provision in its terms, comprehends the great majority of charges upon land by way of mortgage, but still does not comprehend all. Judges are sometimes obliged to say of a case before them, and of a statute relating to the general subject matter, that it is a *casus omissus*; the difficulty here is, that the case in question is omitted, and not only so, but I cannot be sure from the language employed that it was not done advisedly by the Legislature, with the intention of confining the operation of the act to mortgages for the payment of money. If I held the act to apply to other mortgages, I could not feel assured that I was not going beyond the province of a judge, and legislating, when I ought to be only interpreting legislation. I am therefore obliged, somewhat unwillingly, I confess, to arrive at the conclusion that the charge in question is not within the Act.

Judgment

As to pecuniary payments in favor of the chargees. The son covenants that he will pay and provide them "whatever money or cash they may require from time to time." It is *pro tanto* a mortgage for the payment of money, but the only consequence of that will be that that burthen goes with the land. It cannot affect the right of the chargees in respect of the burthen not reached by the provision of the statute.

Then, if our Act 29 Vic. does not apply, is there any principle upon which I can hold that the fact of the father as heir of his son, inheriting the estate charged, is a bar to his claiming upon the personal estate. Apart from that fact, the personal estate is clearly liable: there is the express

covenant of the son; and it is primarily liable, the statute not applying. The cases cited by Mr. *Spencer*, *Donisthorpe* v. *Porter* (*a*), and *Price* v. *Gibson* (*b*), proceed upon the doctrine of merger. It is obvious, that the doctrine of merger does not apply in this case. There is no intention to merge proved, or to be implied; and the interest of the person in whom the ownership of the estate, and the charge upon it are vested is very clearly against merger. *Higgins* v. *Shaw* (*c*), to which I was also referred, has no application to this case. 1870. Slater v. Slater.

It has occurred to me whether the case might not possibly be open to this view. The transaction between the father and son rested upon mutuality. The son gets the land from the father, and the father on the other hand was to get maintenance; and got the covenant upon which he claims as a creditor: the one was a consideration for the other. It was never contemplated that the father should have both: yet he has both if he can come upon the personal estate for his maintenance. I apprehend, however, that this is only *plausible* reasoning. The expectations of both have been falsified by an unlooked for event. The son got all that he was to get—the land, and perfect dominion over it, subject, of course, to the charge upon it. It was an accident that it got back into the hands of the father. There was no failure of consideration, supposing that it could apply in a case of covenant: and I know of no equitable principle that can be interposed between the plaintiff and his right to have the mortgage paid out of the personal estate. Judgment.

It seems to be a very hard case. It looks like a harsh exercise of legal right, for the plaintiff, now that the land has come back to him; not to be content that matters should be restored to their old position; but that he should exact from his son's widow, that which was the price of the land. If there are creditors it may make less difference. If there

(*a*) 2 Eden, 162. (*b*) 2 Eden, 115. (*c*) 2 Dr. & War. 356.

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are no creditors, and the maintenance is paid out of the personal estate, half of it belonging to the father, it would leave the other half to be at the expense of the widow. It looks hard upon the widow; and harsh on the part of this plaintiff; but that, I need hardly say, is not a ground *per se* upon which a court of equity can act. It cannot interfere merely upon the ground that a transaction is against good morals, or such as a man of honor or right feeling would not enter into. If the plaintiff upon this covenant is a creditor upon his son's estate, this court cannot refuse him an administration of the estate upon any notion it may entertain that, as a matter of propriety and right feeling he ought not to ask it.

Since writing the foregoing I have met with a case almost identical in its circumstances, and not differing at all in principle. The case is *Coppin* v. *Coppin* (*a*), decided by Lord *King* in 1725, and referred to by Sir *James Wigram* in *Courtenay* v. *Williams* (*b*). An elder brother contracted to sell to his younger brother certain real estate and conveyed the same to him. The younger made a will charging his estate with legacies; but the will was not so attested as to pass real estate; and the elder brother took the estate as heir-at-law. By his brother's will he was appointed his executor. The purchase money of the land had not been paid, and the elder brother claimed that it should be paid out of the personal estate, and Lord *King* so adjudged. He said "that the only matter which made the difficulty in this case was, that there happened to be one and the same person both heir and executor of the testator, and likewise vendor of the land; but this must be considered in the same light as if there were several persons, and *cum duo jura in unâ personâ concurr 'æquum est ac si essent in diversis*, and then taking it that they had been several, one the heir, the other executor, and the defendant *John Coppin* a third person, neither heir nor executor, but vendor, the person who was heir would have a plain title to the land purchased, the person that was executor must, out of the

Judgment.

(*a*) 2 P. Wm. 291. (*b*) 8 Hare, 552.

testator's personal assets, have paid the residue of the purchase money to the defendant, *John Coppin*, the vendor, who would have as plain a title to receive it; under these circumstances everything had been so plain as to have admitted of no dispute, and in justice and reason it ought to make no difference, (the fact being clear) that the same person happens to be the vendor, and afterwards the heir and executor of the vendee."

1870.

Slater v. Slater.

My conclusion is that the order must go.

HARVEY v. BOOMER.

Next friend—Costs—Time for appealing from Chambers.

A *feme covert* plaintiff has a right to change her next friend without notice to the former next friend and without giving him security for the costs already incurred. But notice to the opposite party is necessary, because the order for security is only given on condition of the antecedent costs of the opposite party being secured, if such a condition is desired by him.

The fourteen days in which a party must bring on an appeal from an order made in Chambers, count from the entering of the order, not from its date.

[January 31, 1870.]

On the 14th of January, 1870, an order was made by the Secretary refusing an application by Mrs. *Harvey*, one of the plaintiffs, for leave to change her next friend; and on the 25th, another application was made for leave to renew the former application, which was also refused. On the first motion the Secretary had offered the applicant an order as asked, but making it a condition that the new next friend should pay or give security for the costs due to the solicitor who till now had acted for the plaintiffs, and had been discharged, on the ground that the former next friend was liable for them. The applicant refused the order on these terms, and affidavits were filed in support of the second motion shewing misconduct on the part of the next friend,

1877. [illegible] appointment [illegible] in any proceeding.
[illegible] From these orders the defendants now appealed, and the matter came on in the first of January.

Mr. [illegible] for the appellants contended that there was no liability on the part of the next friend if a married woman is the plaintiff; that the suit is the suit of the married woman, and not of her next friend, who has no control over it; and that there is no necessity for appointing the next friend. The next friend, at best, the next friend was in the same position as a solicitor, who could be discharged at any time by an order of course. There was no authority for the terms imposed by the Secretary, except in cases where it had been sought to continue the next friend of an infant, but there is a difference between the case of an infant and that of a married woman, for in the former the suit is the suit of the next friend, but in the latter case the next friend does not control the suit. The married woman is made a party to the defendants, and when removed, the liability is transferred to the person who takes her place.

Mr. [illegible] *Bibb*, for some of the defendants, and for the former next friend, opposed that it was too late to appeal from the order of the 14th, more than fourteen days having elapsed. He argued that the next friend was liable to pay costs in default of the client, and therefore should not be discharged without the costs being provided for. That there was no authority for discharging a next friend without making such provision.

No cases were cited on either side. The learned counsel argued at length on the special grounds of this case shewn by the affidavits; but it is unnecessary to give the arguments for the purpose of this report.

Judgment. M. Wat. V. C.—This was an appeal from certain orders made by the Secretary in Chambers. The appellant is one

1870.

Harvey v. Boomer.

of the plaintiffs, and is a married woman. On the 14th January, 1870, she applied for leave to change her next friend, which application was refused. On the 18th she renewed the application, and the new application was refused on the ground that the former motion for the same purpose had been dismissed. On the 25th she applied for leave to renew these applications, and this motion was likewise refused. The plaintiffs had obtained an order for changing their solicitor, and it appears by the admissions of counsel on both sides that the Secretary was willing to make the order on the terms, amongst other things, of the new next friend undertaking to pay or giving security for the costs due to the displaced solicitor; but the new next friend, not being willing to enter into this undertaking or to give this security, the terms offered were not accepted, and the leave applied for was therefore refused.

Judgment.

I find no precedent for imposing the condition suggested. A party is at liberty to change his solicitor at any time, and to obtain for that purpose an order of course, except under special circumstances which are mentioned in the books of practice(*a*), and which have no application to the present case. I see no reason why the rule should be otherwise in the case of a next friend. It does not appear by the books that in such a case it is necessary to serve on the old next friend a notice of the application for the change. Notice to the opposite party is necessary, because the order for leave is only given on condition of the antecedent costs, if any, of the opposite party being secured, if such a condition is desired by him (*b*). The applicant claims that, if not entitled to change her next friend as of course, the special circumstances of the case warrant the change; but into these I do not enter.

It was objected that, if any of the three orders made by the Secretary is objectionable, it is that of the 14th January;

(*a*) See Daniell's Practice, 4th ed. 412, 1700.

(*b*) See Seton Dec. 1252, 3rd ed.; Daniell's Practice, 4th ed. 112.

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and that the fourteen days, within which an appeal from that order should have been brought on, expired before the 31st, when the appeal motion was made. But I think that the fourteen days count from the entry of the order, which was the 18th January, and not from the date of the order. The 324th of the Consolidated Orders provides that rehearings of causes, and applications in the nature of rehearings, are to be within six and four months, respectively, from the passing and entering of the decrees or orders. Under this order it was held that the day for rehearing must fall within the period named, and that it is not sufficient that the notice should be served within that period (*a*). The 329th Consolidated Order provides that motions to discharge or vary orders made by the Judge's Secretary, "are to be made within fourteen days," not saying from what day. Under this order I held (*b*) that the motion in such a case must be brought on within fourteen days; and I think that the day from which the fourteen days are to be reckoned must be construed to be the entering of the order, as mentioned in the 324th Order. The Secretary's order, then, having been made on the 14th, but entered on the 19th, I think that a motion made on the 31st to vary the order is in time.

Judgment.

I think that the plaintiff was wrong in making her second and third applications to the Secretary; that those applications were rightly refused; that the order of the 14th January should be varied; and that the leave asked for be given in terms of the form in *Seton* on Decrees (*c*). No costs of the appeal motion.

(*a*) Re Miller, 12 Gr. 73.

(*b*) Jackson v. Gardiner, 2 Chan. Cham. R. 385.

(*c*) P. 1252, No. 6.

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THOMPSON v. CALLAGAN.

Security for costs.

Where a defendant had by answering waived his right to security for costs, and the plaintiff assigned his interest in the mortgage, the subject of the suit, to a party resident out of the jurisdiction. It was held, that the defendant was entitled to security for costs against the new plaintiff.

The fact that the suit was a foreclosure suit, was held not to disentitle the defendant to the order for security against the plaintiff, although a mortgagor, he disputing that any thing was due, and the master being directed to inquire "what, if any thing was due.".

[March 8, 1870.]

Mr. *McWilliams* moved for an order for security for costs. An order to revive had been taken out, dropping the name of the plaintiff and substituting that of *Claxton*. This was the ground on which he moved. It also appeared on the face of the order to revive, that *Claxton* lived in Montreal. The plaintiff might say that this was a mortgage case, and it was not usual to grant security in such cases. This was not, however, the usual mortgage case, for the defendant claimed that the mortgage had been given to cover future advances, which, in fact, had never been made, and the decree which reserved costs, ordered a reference as to what consideration had been given for the mortgage.

Mr. *Mortimer Clarke* opposed the application, on the ground, that it was a mortgage case, and that the former plaintiff also resided out of the jurisdiction.

THE SECRETARY.—The plaintiff having assigned his mortgage, the suit has been revived in the name of the assignee as plaintiff. The defendant now moves for security for costs; the assignee being a resident out of the jurisdiction. The application is opposed on two grounds, first, that the original plaintiff was also out of the jurisdiction, and the defendant having answered, his right to security is waived: second, that this is a suit for the foreclosure of a mortgage, and so the defendant, the mortgagor, cannot have security. Judgment.

1870.

Thompson v. Callagan.

As to the first objection, it would appear that when a defendant being entitled to security for costs, has lost or waived his right against the original plaintiff, he is not, in the event of the suit being revived, thereby prevented from obtaining security against the new plaintiff, if he is not out of the jurisdiction: *Jackson* v. *Davenport* (*a*). As to the second objection, this is not an ordinary mortgage suit. The defendant does not admit that the plaintiff has any claim against him whatever, and the decree directs the Master to make special inquiries, and to report "what, if any thing is due," reserving further directions and costs.

I think the defendant is entitled to security.

LINDSAY PETROLEUM COMPANY v. HURD.

Payment of money out of court.

Where a certain sum of money ordered to be paid to the plaintiffs under a decree had, pending a re-hearing and appeal, been paid into Court by arrangement between the parties, to obtain a stay of proceedings, in lieu of the security required by sub-sec. 4, of sec. 16, of the act relating to appeals: and on the appeal the decree was affirmed only in part, that part directing the payment of the money, being in part reversed by the amount being reduced to a comparatively small sum; a motion to pay out the money to the party who had paid it in was granted by the Secretary, though strenuously opposed, and his order was confirmed on appeal to the full Court.

[Rehearing Term, March, 1870.]

This was an appeal from an order made in Chambers.

Mr. *Crooks*, Q. C., and Mr. *J. Hoskin*, for the appeal.

Mr. *Hector Cameron*, contra.

(*a*) 29 Beav. 212.

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A decree had been made in the cause directing the defendant *Farewell* to pay to the plaintiff $16,070.

The defendant *Farewell* had applied for leave to pay the same into Court, and that all proceedings under the decree be stayed pending a re-hearing, it was agreed also that the sum so paid should, in the event of an appeal, stand as a security for the purpose of such appeal in lieu of the security required by sub-sec. 4 of sec. 16, of the act relating to appeals. To this application the plaintiff consented, and an order was made, and the money paid into Court.

The case went to hearing and ultimately to appeal, when the Court of Appeal varied the decree by reducing the sum ordered to be paid to about $4000.

An application was made before the Secretary, on the part of the defendants, for the payment out of Court of the difference between the last named amount and the sum paid in, which application was granted.

Statement.

The plaintiff appealed to a judge and the question was argued before *Mowat*, V. C., who expressed a desire that the matter should at once be brought before the full Court then sitting in re-hearing term.

The matter now came up for re-hearing.

Mr. *Crooks*, Q. C., for the defendant, contended that the present question could only properly be brought up on petition. *Prima facie*, the money should be paid back or paid out as a matter of course. It is no answer that the plaintiff proposes to appeal to the Privy Council. If they have any right consequent upon that, they should make an independent motion, in the nature, as it were, of a motion for injunction, and further, such motion should be to the Court of Appeal where the case now is. To retain the money would be an indulgence to the plaintiff, and he should be

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the party to seek it; but the real question is whether the Court has any jurisdiction to entertain such an application. [THE CHANCELLOR.—A petition is necessary where the proceeding is something extraneous to the course of the cause. An appeal is not of that nature; this is an appeal.] If the plaintiffs have any rights growing out of the circumstance of the contemplated appeal to the Privy Council, the Court of Appeal, from which tribunal they seek to appeal, is surely the place where they should go for relief. [THE CHANCELLOR.—The matter has been remitted back to this Court.] No; or if so remitted, it is only that the direction of the Court of Appeal may be carried out, and the money paid out. It would be reviewing the decision of the Court of Appeal if this Court made any other order.

Argument.

It is for the plaintiff to shew that a larger sum than $4000 should be retained, he has no right to assume that he will get more on his present appeal than was given him by the Court of Appeal. The Court of Appeal has in effect said that no larger sum than $4000 should have been paid in, if an execution had been issued for the sum originally decreed, it would have been reduced on application to the $4000, and he claimed to stand in an equally good position as if the Court had decreed correctly in the first instance. It would be anticipating the decree of the Privy Council, to hold otherwise. The plaintiff should shew strong grounds for such an order, such as insolvency, danger of loss of fund; such grounds, in short, as would support an injunction, which does, it is true, anticipate a decree. He cited *McQueen's* Pr. (*a*), *Archer* v. *Hudson* (*b*).

Mr. *J. Hoskin* followed on the same side, and explained the circumstances under which the money had been paid in, and read the order for its payment. He contended that the defendants were bound to shew danger to the trust fund to suppport their case. [THE CHANCELLOR.—That does

(*a*) H. L. 321-236. (*b*) 8 Beav. 321.

not accord with recent cases.] There is not here even a suggestion that any danger exists of loss of fund. In England where proceedings are sometimes stayed pending an appeal, the proceedings in appeal can be speeded more than can be done here: he cited *Walburn* v. *Nigilly* (*a*), *Waldo* v. *Caley* (*b*), *Willan* v. *Willan* (*c*), *The Warden of St. Paul's* v. *Morris* (*d*), *Tyson* v. *Cox* (*e*), *Harrington* v. *Harrington* (*f*), *Archer* v. *Hudson* (*g*), *Herring* v. *Clobery* (*h*), *Taylor* v. *Midland Railway Co.* (*i*), *Ralli* v. *The Universal Marine Assurance Co.* (*j*), *Talbot* v. *Staniforth* (*k*), *Walford* v. *Walford* (*l*), *Storey* v. *Lord Lennox* (*m*), *Lady Topham* v. *The Dean of Portland* (*n*), *King of Spain* v. *Machado* (*o*), *Barrs* v. *Fewkes* (*p*), *The Mayor of Gloucester* v. *Wood* (*q*), *Huguinin* v. *Bazely* (*r*), *Suisse* v. *Lord Lowther* (*s*), *Gwynne* v. *Lethbridge* (*t*), *Lord* v. *Colvin* (*u*).

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Mr. *Hector Cameron*, contra. As to the preliminary objection of Mr. *Crooks*, that we should apply to the Court of Appeal; this is no application under the statute, it is an application under the equitable jurisdiction of this Court; a jurisdiction which has always been exercised under similar circumstances. Again, the Court of Appeal has remitted the case back to this Court. The appeal to the Privy Council is not to be treated as an appeal from the Court of Appeal, but from the Court where the cause arose. The Court of Appeal has now nothing to do with the cause; however, that has in effect been waived; we come here almost by consent; we went before the Secretary by consent; and

Argument.

(*a*) 1 M. & K. 61-81.
(*b*) 16 Ves. 206.
(*c*) 16 Ves. 215.
(*d*) 9 Ves. 316.
(*e*) 3 Madd. 278.
(*f*) 3 L. R. Chy. Appls. 564.
(*g*) 8 Beav. 321.
(*h*) 12 Sim. 410.
(*i*) 9 W. R. 854.
(*j*) 10 W. R 327.
(*k*) 10 W. R. 829.
(*l*) 3 L. R. Chy. Appls. 812.
(*m*) 1 M. & C 685.
(*n*) 1 DeG. J. & S. 608.
(*o*) 4 Rus. 560.
(*p*) 1 L. R. Eq. 892.
(*q*) 3 Hare, 150.
(*r*) 15 Ves. 180.
(*s*) 2 Hare, 438.
(*t*) 14 Ves. 585.
(*u*) 1 Dr. & S. 475.

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both parties desired an adjudication by your Lordships. As to our making a substantive application, the question can be disposed of on the present motion, and there is no need of that course. It was contended on the other side, that it was only a "trust" fund which could be kept in Court. The money in this instance, answered that description; it was not paid in as a security alone; it was paid in in obedience to a decree, and was suffered to remain as security on a consent order. It became a trust fund; it was paid in for a specific purpose, but afterwards suffered to remain in trust for another purpose, and thus became a trust fund. The money might have been withdrawn when the original specific purpose for which it was paid was answered; but it was left in trust to abide the result of the appeal, not, merely as security for appealing, for a bond would have answered that purpose, and that was all they were called on to give. It was a fund to abide the result of litigation, and thus a trust fund. The practice in England, laid down by Lord *Eldon*, when he spoke of staying proceedings paralysing the arm of justice, was not acted on now. He contended further, that in England the Court will not allow a fund of this nature to be paid out without taking security for its being refunded if required, and cited *Mayor of Gloucester* v. *Wood* (*a*). He pointed out that the money spoken of was money which had been paid to plaintiffs for purchase money, to which, it was contended, they were not entitled, and the paying it into court was not equivalent to paying money out of pocket; but he did not admit that the rule applied only to trust funds.

Argument.

If money paid out, it should be on terms of security being given to refund: he was willing to submit to any reasonable terms as to the speedy prosecution of the appeal. As to the claim for profit on the investment, the money was paid in by consent, and both sides took their chance of profit or loss.

(*a*) 3 Hare, 150.

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He cited the following cases: (*a*), (*b*), *Way* v. *Foy* (*c*), *Mayor of Gloucester* v. *Wood* (*d*), *Gibbs* v. *Daniel* (*e*), *Earl of Shrewsbury* v. *Trappes* (*f*), *Taylor* v. *Midland Railway Co.* (*g*), *Barrs* v. *Fewkes* (*h*), *Walford* v. *Walford* (*i*), *Cotton* v. *Corby* (*j*).

SPRAGGE, C.—The position of the money in Court in this cause, and of the parties to the suit in relation to it, are substantially different from what has existed in any of the cases to which we have been referred. It has not been put to us, that this is a case in which we could, before decree, have ordered money into Court; and I am satisfied that we could not have ordered it into Court. When ordered into Court as a trust fund, or in any way as a fund which the Court ought to preserve *in medio*, there is reason in its being so preserved, until the ultimate decision of the case, where the Court has reason to believe that the appeal from its decision is *bonâ fide*; and in the exercise of its discretion that it will be conducive to the ends of justice. *Way* v. *Foy* (*l*), *The Mayor of Gloucester* v. *Wood* (*l*), *Barrs* v. *Fewkes* (*m*), are instances of the exercise of this discretion.

Judgment.

But, this case stands outside all cases of the class to which I have referred. The money was not, and could not be ordered into Court. It was brought into Court not *in invitum*, at the instance of the plaintiff, who claimed it in the suit; and could not be from the nature of the claim; but at the instance of one of the defendants, ordered by the decree to pay. And it was brought in, to answer a particular purpose. This purpose sufficiently appears from the order, under which it was brought in. The decree had

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(*a*) Daul. Pr. 1354.
(*b*) Seton, 2157.
(*c*) 18 Ves. 452.
(*d*) 3 Hare, 150.
(*e*) 9 Jur. N. S. 632.
(*f*) 2 D. F. & J. 172.
(*g*) 9 W. R. 854.
(*h*) 1 L. R. Eq. 392.
(*i*) 3 L. R. Chy. Appls, 822.
(*j*) 5 U. C. L. J. 67.
(*k*) 18 Ves. 452.
(*l*) 3 Hare, 150.
(*m*) 1 L. R. Eq. 392.

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ordered the payment of the money to the plaintiffs, not its payment into Court; and the defendant, *Farewell*, desiring to rehear the cause before the full Court; and if unsuccessful upon rehearing to carry it to the Court of Appeal, applied to this Court, to stay proceedings upon the decree, *i. e.* to stay the money being levied by the process of the Court, upon his bringing the money into Court. The order made was that upon payment of the money into Court all proceedings under the decree for the recovery and realization of the sum ordered to be paid should be stayed until after the rehearing of the cause: and it was further ordered that in the event of the decree being affirmed upon rehearing, the deposit should, at the option of *Farewell*, in case he should desire to appeal to the Court of Error and Appeal, stand as a security for the purposes of such appeal in lieu of the security required by sub. sec. 4 of sec. 16 of the act (*a*): *Farewell* giving in addition the usual bond given upon appeal or paying into Court $400 in lieu thereof. *Farewell* thus did under the authority of the Court, what was allowed to be done in *Winters* v. *The Kingston Permanent Building Society*(*b*), with a view to a rehearing, by analogy to the practice upon appeals, so far as his rehearing was concerned; and as to the contemplated appeal, the sum to be paid into Court was expressly put as in lieu of the bond required by the 4th sub. sec. of the statute. There can, I apprehend, be no doubt that a bond given under the statute, is only to answer the judgment of the Court of Error and Appeal of this Province; not the ultimate decision of the case if carried further; and what was given in lieu of the bond must stand upon the same footing as a bond would, if a bond had been given. If the the Court of Appeal had dismissed the plaintiffs' bill the condition of the bond would have been satisfied, and *pari ratione*, the defendant appealing would have been entitled to a return of his money paid into Court. And the same reason applies, of course, where the decree is affirmed only

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(*a*) 22 Vic. ch. 13. (*b*) 1 Chan. Cham. Rep. 215.

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in part, a case indeed provided for by the statute. To keep the money in Court to answer a contemplated appeal to the Privy Council, would be doing that which there is nothing in law or practice to warrant, and would, in my view of the the case, be verging upon bad faith. *Farewell* need not have paid in the money.' If a correct view was taken, in *Winters* against the *Building Society*, of the position of a a party about to rehear a decree directing the payment of money, *Farewell* might have given security, instead of paying money into Court, just as he was entitled to do upon appealing to the Court of Appeal; and he had reason to believe that the Court would hold money paid in as security upon repealing, upon the same footing as a bond given as security upon appealing, for which it was a substitute, and would hold it for no other purpose. My conclusion is, that he is entitled to have paid out to him the excess beyond the amount adjudged against him by the Court of Appeal.

I have not thought it necessary to consider other points raised by Mr. *Crooks*. His client applied in Chambers for the payment out to him of the excess to which I have referred, and obtained an order. This is an appeal from that order, and we think the order right, the other points therefore need not be considered.

Judgment.

A question is raised, arising from the circumstance of the money paid in having been since invested in Dominion Stock, such stock having since reached a higher market value then that at which it was purchased. The plaintiffs claim the benefit of this increase in value upon the sum adjudged to be paid to them. I think that they are not entitled to it. The money was paid in, not in satisfaction of the sum adjudged by this Court to be paid, in the event of the first decree being affirmed; but as security, that in that event the sum adjudged to be paid should be paid. If the stock had fallen instead of risen in value, there would be no reason in compelling the plaintiff to accept payment in depreciated stock. His answer would be, that he was

1870. entitled to what the decree gave him, payment of so much money and interest; and that in my judgment is his right. I think the appeal should be dismissed with costs.

Lindsay Petroleum Co. v. Hurd.

MOWAT, V. C., concurred in the judgment of the Chancellor.

STRONG, V. C., having been concerned in the cause while at the bar, did not sit on the re-hearing.

CASEY v. McCOLL.

Suing in forma pauperis—Liability for former costs—Pauper or dives costs.

A plaintiff suing *in forma pauperis* is not liable to have his suit stayed until he has paid the costs at law, or of a former suit in this Court, touching the same subject matter, unless it can be shewn that the proceedings are vexatious.

Where therefore a plaintiff had been ordered to give security for prior costs at law, and by another order the time for giving security had been limited and in default the bill ordered to be dismissed, and the plaintiff was afterwards admitted to sue *in forma pauperis*, the two orders for giving security were set aside.

Where costs are given to a plaintiff suing *in forma pauperis*, they are in general, and unless otherwise ordered, *dives* costs.

Two orders had been made in this cause as stated in the head-note, and on an application, before the Secretary, to set them aside, he gave the following judgment which very fully explains the circumstances:—

Judgment. THE SECRETARY.—The plaintiff moves to discharge two orders made in Chambers, on the 8th of May, and 25th of October, 1869. By the first of these orders, after reciting that the plaintiff had brought an action at law against the defendant for the same matter, the costs of which remained unpaid, proceedings were stayed until the costs of the action were paid, or security for the costs of this suit given. By

the second, a time was limited for giving security, and in default the bill was to be dismissed.

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Casey v. McColl.

On the 23rd November, 1869, *Mowat*, V.C., admitted the plaintiff to prosecute this suit as a pauper. The present application is based upon this order, and it is contended for the plaintiff, that he having been allowed to proceed *in forma pauperis*, he cannot be required to give security for costs. The language of Lord *St. Leonards*, in *Burke* v. *Lidwell* (*a*) is quoted as supporting this, but it goes no further than affirming the general well-established principle laid down in *Daniell's* Practice, 40, and in other books of practice, that no man is prevented from asserting his rights in this court because of his poverty, and that the poverty of a plaintiff is no grounds for ordering security to be given. It is further urged that the question to be considered in such a case as the present, and upon which the ordering security or not, depends, is whether the second suit is a vexatious one. If it is not, it is said security will not be required.

Judgment.

For the defendant it is contended, that the practice of the court is to stay proceedings until the costs of a former suit for the same matter, in this or another court are paid, or until security for the costs of the second suit is given, and that, as a person who during the pendency of a suit, is admitted to sue or defend *in forma pauperis*, will, if the merits so require, be ordered to pay costs up to the time when he became a pauper (*b*), and may be attached for the non-payment of such costs, so he cannot by commencing a second suit as a pauper, escape liability for the costs of a former suit, and should, therefore, be required to give security.

In *Follis* v. *Todd* (*c*), the present Chancellor ordered security (the only relief prayed) to be given, and I recently

(*a*) 1 J. & L. 703.

(*b*) Mor. & Dav. 267; Marshall on Costs, 352.

(*c*) 1 Chan. Cham. R. 290.

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followed that authority, in *Bondy* v. *Fox*, and made an order staying proceedings until the costs of a former suit were paid, or security given for the costs of the suit in this court. In neither of these cases did the plaintiff prosecute the second suit *in forma pauperis*.

Assuming then the general rule to be, that the court will stay proceedings until the costs of a former suit are paid, or security given, the question is whether the fact of the second suit being prosecuted *in forma pauperis* makes any difference.

As the statute (*a*) under which persons are permitted to sue *in forma pauperis*, extends only to courts of law, and courts of equity have only adopted the common law practice in permitting such a proceeding, the decisions at law upon this point are applicable by analogy to courts of equity (*b*). In *Marshall* on Costs (*c*), it is said that if the plaintiff did not sue in the first action as a pauper, if he brings another action, although he sue in the character of a pauper in the second action, proceedings will be stayed until the costs of the former action have been paid. Three cases are cited as authorities for this statement. In the oldest case, *Weston* v. *Withers* (*d*), the plaintiff having been non-suited in the first action, proceedings in the second were stayed. What were the merits of the case do not appear from the report, and the case was decided upon two unreported cases which are mentioned shortly in a note. In one of these, *Moulton, qui tam*, v. *Bingham*, the attorney of the plaintiff was willing to pay the costs, and the judgment of the court was, that if the costs were paid within a week, the rule staying proceedings should be discharged, but in default was to be absolute. In the other case of *Baldwin* v. *Richards*, the second suit was considered by the court vexatious, and on that ground proceedings were stayed. In

Judgment.

(*a*) 11 Henry VII. c. 12.
(*b*) Corbett v. Corbett, 16 Ves. 410.
(*c*) P. 250.
(*d*) 2 T. R. 514.

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Haigh v. *Paris* (*a*) the plaintiff had a verdict on the first action, leave being reserved to the defendant to move to enter a non-suit on the grounds of misdirection, and in term the court granted a rule absolute for a new trial, but the plaintiff instead of proceeding with the action, commenced a second one. The court considering his conduct in thus commencing a second and unnecessary action to be vexatious, stayed proceedings. In *Hoare* v. *Dickson* (*b*), the plaintiff having brought *in forma pauperis*, a second action of slander, proceedings were stayed. In that case *Wilde*, C. J., founded his judgment on the fact, that the question had in the first action been tried upon the merits, saying, "the plaintiff's counsel consented to a nonsuit, not upon any technical ground, but on the merits, and from a conviction, from which it was impossible to escape, that the plaintiff could not establish her right to a verdict." He further laid down the principle upon which the court acts, in these words: "where a party has brought an action, and has had an opportunity of trying that action upon the merits, and has either failed upon the merits, or has withdrawn his case, and afterwards brings a second action for the same cause, leaving the costs of the first unpaid,—the court will interpose its authority to prevent him from harassing his opponent."

Judgment.

These cases shew that the practice of enquiring whether the second suit is a vexatious one or not, is not confined to those cases in which both suits are brought *in forma pauperis* (*c*); but that it applies equally when the plaintiff is a pauper in the second suit only.

In the present case the plaintiff was not defeated on the merits in the action at law, but failed on a purely technical ground. His action was brought to recover unpaid purchase money for a parcel of land, which he sold to the

(*a*) 4 D. & L. 824.
(*b*) 7 C. B. 164.
(*c*) Daniell, 40.

1870. defendant, and it appears from the report of the case (*a*) that the jury found that the original purchase money being $800, he had received from the defendant only $41, and they gave him a verdict for $791. In term this verdict was set aside, and a nonsuit entered on the ground, that the deed given by the plaintiff to the defendant containing an acknowledgement of the purchase money having been paid, the plaintiff could not recover at law. The present suit is a bill to establish a vendor's lien, and I do not think I can say that it is vexatious.

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Besides that the plaintiff here sues as a pauper, the present case is distinguishable from *Follis* v. *Todd*, and *Bondy* v. *Fox*, in another respect. In *Follis* v. *Todd*, although the learned Chancellor considered the plaintiff's equity clear, if the allegations in his bill were true, and if true, the defence at law an unrighteous one, yet he was undoubtedly influenced in coming to the conclusion he did, by the fact that the defendant swore to merits, and on the application before him he could not try the merits. In *Bondy* v. *Fox*, the plaintiff failed in her action, because the registry law was a bar to her obtaining any relief in a court of law, but on the motion before me, the proposed answer sworn to by the defendant was produced, and it set up facts which if true, were a complete defence. Here the defendant does not swear to merits, or file any affidavit. He relies on the cross-examination of the plaintiff as shewing that he is not the real plaintiff, but that the suit is brought in his name by one of his creditors. It is true the plaintiff says, that this creditor and a solicitor came to him and asked him to let the case be taken in hand, and allow his name to be used as plaintiff, and that he said he was willing; he has heard they have brought the case into Chancery, but that he did not tell them to do so, and that *Morton* (the creditor) was to bear all the expenses. The plaintiff is an old man, and as he says himself, his memory is bad; and I think the

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(*a*) 19 C. P. U. C. 90.

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fairest conclusion to draw from his deposition is this, that *Morton* having a claim against him, went to him with a solicitor, and urged him to have proceedings taken to assert his claim to the purchase money in question, and that the old man finding that a solicitor believed his claim a good one, and was willing to prosecute it, gave a general authority to take the necessary proceedings on his behalf. A special authority to institute the present suit was not required, and if the solicitor was willing to carry on the suit, trusting to his ultimate success in recovering the money, and getting his costs, I cannot say there was anything improper, or that because part of the money which is hoped to be recovered in this suit is to be applied in paying the debt due to Morton, the plaintiff is merely a nominal plaintiff, and so should give security for costs as in *Mason* v. *Jeffrey* (*a*),

Judgment.

The case of *Dundas* v. *Johnston* was cited in argument by the defendant's solicitor, as a recent decision in Common Law Chambers, staying proceedings under circumstances similar to those in this case. As it is exceedingly desirable that in such a matter as the present, the practice here and at common law should be uniform, I have spoken with the Master of the Queen's Bench, and I am glad to find that the view I have taken of the practice is in exact accordance with his own, arrived at upon a careful review of all the authorities. He informs me that in *Dundas* v. *Johnson*, the first action was decided against the plaintiff on the merits, and in staying proceedings he only followed *Hoare* v. *Dickson* (*b*).

I therefore make an order setting aside the two orders of the 8th May, and 25th October, 1869, and permit the plaintiff to proceed with his suit.

From the order thus granted the defendant appealed, and the appeal came on to be heard before *Mowat*, V. C.

(*a*) 2 Cham. R. 15. (*b*) 7 C. B. 164.

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Mr. *J. A. Boyd*, for the defendants, contended that the plaintiff had no *locus standi* when the application to the Secretary was made, to set aside the two orders; that if the order made by him previously had any effect at all, the bill was virtually dismissed, and the plaintiff's position gone, in consequence of his non-compliance with the order to give security; that the Secretary's view was therefore erroneous, he should not have gone behind the order of the 8th May. The judgment of the Secretary also assumed, he urged, that vexation was a necessary element which defendant must shew, whereas it would be presumed by the Court, from the circumstances shewn, that the proceedings were vexatious. The Secretary had no jurisdiction to review the order of 8th May, which had been been made by a judge, and had no right to conclude that defendant had no defence on the merits. He cited among other authorities 29 & 30 Vic. ch. 32, sec. 1; *Dean* v. *Lamprey* (*a*), *Shepherd* v. *Hayball* (*b*), *Elliot* v. *Pinkerton* (*c*), *Follis* v. *Todd* (*d*), where the authorities are carefully reviewed by *Sprague*, V.C.; *Spires* v. *Sewell* (*e*), *Marshall* on Costs (*f*), *Weston* v. *Withers* (*g*), *Wild* v. *Hobson* (*h*), *Davenport* v. *Davenport* (*i*).

Judgment.

Mr. *Smart*, contra, for the plaintiff. On the 25th of November, the Court ordered the plaintiff to be admitted to sue *in forma pauperis*, and the plaintiff then became entitled to all the advantages that position gave him. The point now taken by defendant of want of jurisdiction in the Secretary, was not taken before the Secretary, and could not properly be urged now; at any rate, it was waived by the defendant's proceeding to examine the plaintiff. No allusion is made in the Secretary's judg-

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(*a*) 2 Chan. Cham. R. 202.
(*b*) 13 Grant. 681.
(*c*) 4 P. R. 86.
(*d*) 1 Chan. Cham. R. 283.
(*e*) 5 Sim. 193.
(*f*) 354.
(*g*) 2 T. R. 511.
(*h*) 2 V. & B. 105.
(*i*) 1 Ph. 124.

ment to any such objection. The order to sue *in forma pauperis*, which was granted for plaintiff's benefit, would be valueless if he was now compelled to give security for costs. He claimed that the present application should be dismissed with costs, and that such costs should be *dives* costs; it was in the discretion of the Court to give *dives* costs. He cited *Church* v. *March* (*a*), *Rattray* v. *George* (*b*). 1870. Casey v. McColl.

Mr. *Boyd*, in reply, contended that the cases referred to were old and had been overruled, and that in no case could a plaintiff suing *in forma pauperis* recover more than disbursements; he cited *Dooley* v. *The Great Northern Railway Company* (*c*).

MOWAT, V. C.—As the defendant does not dispute the plaintiff's equity as set forth in his bill; and as the action at law was not decided on the merits, but upon the technical grounds mentioned in the opinion of the Secretary, I think that the authorities warrant the conclusion that the plaintiff, suing in the second suit *in forma pauperis*, is not liable to have his suit stayed until he has paid the costs at law; and certainly such a conclusion expresses a just rule. In addition to the authorities referred to by the Secretary, two of the cases cited for the defendant on the appeal, contain observations which tend to support the same view. I refer to *Spires* v. *Sewell* (*d*), and *Wild* v. *Hobson* (*e*). *Fitton* v. *Earl of Macclesfield* (*f*) (which was not cited) is an authority against the appeal. I refer also to *Corbett* v. *Corbett* (*g*). Even where neither suit has been brought *in forma pauperis*, the present rule at law is against staying proceedings in a new suit until costs in a former suit are paid or secured, except where the plaintiff's proceeding is vexatious. In the late case of *Cobbett* v. *Warner* (*h*), the Court distinctly recognized it to be so: "We wish to guard Judgment.

(*a*) 2 Hare 655. (*b*) 16 Ves. 232 (*c*) 4 E. & B. 341.
(*d*) 5 Sim. 193. (*e*) 2 V. & B. 105. (*f*) 1 Vern. 264.
(*g*) 16 Ves. 407. See 1 Daniell's Pr. 4th ed.; Davey on Costs, 270.
(*h*) 2 L. T. Q. B. 108.

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against being supposed to lay down a general rule, that this course is to be adopted whenever costs of a former litigation are unpaid; but we think that when that is the case, and the plaintiff fails to satisfy the Court, that there is a real or probable cause of action, though he failed to establish it in the former litigation, the proceeding is so *prima facie* vexatious and harassing that the Court ought to interfere to stop it till the former costs have been satisfied." The Court also said that "this summary jurisdiction should be sparingly exercised."

It was objected, that the order to discharge should not have been brought on before the Secretary; that for the purposes of the argument before him those orders were conclusive. But the orders discharged were made after argument before the Secretary, and not before me personally; and the defendant did not ask that the application to discharge them should be adjourned for argument before a judge in person, as he had the right of doing. The objection now made must, therefore, be over-ruled, and the order appealed against affirmed with costs.

Judgment.

Dooley v. *The Great Northern Railway Company* (*a*) was cited to shew that the Court of Queen's Bench in England (over-ruling numerous cases to the contrary) had decreed that when a pauper got costs he should only have costs out of pocket; but that rule has not been adopted in Chancery. Lord *Cottenham* expressly held in *Rubery* v. *Morris* (*b*), that costs awarded to a pauper should in general be *dives* costs; and the practice of the taxing officers having been to tax pauper costs only, where costs were awarded *simpliciter* to a party suing or defending *in forma pauperis*, his Lordship inserted on the order an express direction, that the costs of the pauper should be taxed as *dives* costs. A month afterwards, a general order was made (10th December, 1849,) dispensing further with the necessity for a decree and

(*a*) 4 E. & B. 341.

(*b*) 1 McN. & G. 413.

declaring "that in all cases in which costs are ordered to be paid to a party suing or defending *in forma pauperis*, such costs shall, unless the Court shall otherwise order, be taxed as *dives* costs." That order now forms one of the English Consolidated Orders (*a*). It is thus apparent that in England the correct rule is held in Chancery to be as stated by Lord *Cottenham*.

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The order to be drawn up on the present appeal may contain a direction, as in *Budge* v. *Budge* (*b*), that the costs of the appeal may be set-off against the costs due from the plaintiff in the other suit.

TYLER V. WEBB.

Time for appealing—Style of affidavit, &c.

The present practice of the Court, as established by decisions, limits the time for appealing to a year from the date of the original decree, where a cause has been re-heard and afterwards carried to the Court of Appeal; but the fact of an application to extend the time for appealing being made before the expiry of a year from the decree on re-hearing, was looked on as furnishing cogent reason for a liberal exercise of the discretion vested in the Court to extend the time, and the time extended accordingly.

On an application for leave to appeal from the Court of Chancery to the Court of Error and Appeal, the proceedings were *held* to be rightly styled as in the Court of Chancery although security for appealing had been perfected.

[March, 1870.]

This was an application for leave to appeal to the Court of Error and Appeal. Statement.

The proceedings were styled in the Court of Chancery; an order had been obtained allowing the payment of $400 into Court in lieu of the security by bond, and the money had been paid accordingly.

(*a*) Xl. sec. 5, (*b*) 12 Beav. 385.

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Tyler v. Webb.

Mr. *Roaf*, Q. C., and Mr. *Foster*, for defendant, appealing.

Mr. *S. H. Blake*, for plaintiff.

A preliminary objection had been taken before the Secretary, that the affidavits and notice should have been styled in the Court of Appeal after security being perfected there, this objection was overruled by the Secretary, and the application for leave to appeal now came on to be heard before a judge.

Judgment.

STRONG, V. C.—But for the decision of my brother *Mowat*, in *McFarlane* v. *Dickson* (*a*), I should have thought that in the case of an appeal, after a re-hearing, when the original decree had been affirmed, the time for appealing would, under the 55th section of the "Act respecting the Court of Error and Appeal," run from the date of the order on the re-hearing and not from that of the original decree. In such a case I should have thought the appeal was both in form and in substance from the decretal order pronounced on the re-hearing. It is obvious that even if the original decree must be appealed from, the order on the re-hearing must likewise be removed before the decree can be reversed or varied: then as by section 11 of the Act, the Court of Appeal has power to give the judgment or decree, "which the court, whose decree is appealed from, ought to have given," it would seem that on an appeal from the order of the full court, on a re-hearing, affirming the decree, and from that order alone the Court of Appeal could make the order which ought to have been pronounced on the re-hearing, and reverse or vary the original decree. I do not think the decision of the House of Lords in *Beaven* v. *Mornington* (*b*), is opposed to this view; for what was there determined was, that an appeal from a decree, after the time limited by the standing orders of the House had expired, was not let in, because it also comprised an appeal from

(*a*) 2 Chan. Cham. Rep. 38. (*b*) 8 H. L. C. 525.

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an order on further directions which was within the prescribed time; the difference between that case and the present being, that there it was impossible to affect the original decree without appealing expressly against it; whereas here, under section 11, the original decree can be reversed on an appeal from the order on the re-hearing alone, the court, on such an appeal not being confined to a simple affirmance or reversal, but having, in the latter case, jurisdiction to pronounce the order which the court below ought to have made. Again, it is plain that, in the case of a decree being *reversed* on a re-hearing, the appeal must be from the order of reversal alone, and the time must run from the date of that order. A further consideration is that an unsuccessful party is entitled as of right to a re-hearing before the full court, and also to an appeal; but, as the law regulating the sittings of the Court of Appeal now stands, to restrict the exercise of the discretion to enlarge the time for appealing given by the 55th section to extraordinary cases, would make it almost imperative in a suitor, desirous of saving his right to an appeal, to forego a re-hearing. This would have the effect of encouraging appeals from the decision of a single judge, a practice highly inconvenient and detrimental to suitors. It is also to be observed that the 31st section, which prescribes the limitation of time in the case of common law appeals, gives the appellant five years within which to bring and prosecute his appeal, besides allowing very liberally for disabilities, as to which the 55th section contains no provision. I do not make these observations with any view of controverting the authority of the decision of my learned brother in *McFarlane* v. *Dickson*, by which I, of course, consider myself bound; but as furnishing in my opinion cogent reasons for a liberal exercise of the discretion given by the 55th section.

Judgment.

Now, to consider the present application as affected by lapse of time only; we find that the original decree was made on the 22nd November, 1868; that the cause was re-heard on the 25th February, 1869; and judgment on the

1870. re-hearing pronounced on the 5th April, 1869, so that a year from the date of the order on re-hearing will expire some two months before the Court of Appeal can sit. The appellant, on the 25th November, paid into court $400 in lieu of the security required by the statute, and on the 29th November 1869, the defendant's solicitors wrote the plaintiff's solicitors, proposing to go to a hearing of the appeal in the then ensuing sittings of the court on the 3rd day of January last; which would have been within nine months from the date of the decretal order on the re-hearing, and little more than thirteen months from the original decree; the only other sittings of the Court of Appeal, at which the defendant could have gone to a hearing since the re-hearing, having been held in July, 1869, within three months from the order on re-hearing, and scarcely more than seven months from the date of the decree.

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Judgment.

Upon this state of facts, if it depended on a question of time merely, I should not hesitate to let the defendant in, more especially as I am satisfied that he always intended to appeal, and that the reason he assigns for not appealing earlier,—inability to obtain sureties, and want of money sufficient for a deposit,—are true. But it is contended on behalf of the plaintiff, that there are in this case special grounds for refusing to relieve the defendant. It is said that on the merits the defendant's conduct appears in a very unfavourable light; but this is a reason to which I can pay no attention, for to do so would be to anticipate the appeal. Moreover, even if it were open to me to entertain any such consideration, the dissenting judgment of his Lordship the Chancellor on the re-hearing, would afford an answer. Then it is said that the case is not a fit one for an appeal, inasmuch as the determination of it turned on the credibility of the witnesses, as to which the decision of the judge who heard the cause ought to be final. I think I cannot give any weight to this objection either, inasmuch as the competency of the appeal upon the ground just mentioned, is a question for the appellate jurisdiction

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itself to decide; but it would appear from the Chancellor's judgment, that this objection is not well founded, since his Lordship proceeds entirely on the law of the case. Lastly, it was insisted with much force that the conduct of the defendant in having, on the 22nd April, 1869, in accordance with the exigency of the decree, signed and sealed a conveyance of the lands in question, precluded him from obtaining the leave he seeks by this application. The circumstances attending the execution, *i. e.*, the signing and sealing of the conveyance, appear indisputably to have been these; the deed having been settled by Mr. *Williams*, the Master at Chatham, the defendant signed and sealed it in the presence of Mr. *Williams* who was the attesting witness, and in Mr. *Williams's* own uncontradicted words, "the defendant in executing the deed and leaving it with me, said he only did so because he was ordered by this honorable court to do so, and said he intended to appeal this case to the Court of Error and Appeal, and that the deed was only to be delivered to the plaintiff on condition that he the defendant should not be prejudiced thereby, in his appeal from the decision of the court." Mr. *Williams's* affidavit (I mean that of the 21st of January in confirmation of his previous certificate) goes much further than this, but up to this point he is uncontradicted. So that it is established beyond question, that the deed was handed to Mr. *Williams*, with the stipulation that it was to be delivered to the "plaintiff on condition that the defendant should not be prejudiced thereby in his appeal." Now, from this it is clear that Mr. *Williams* had no authority, from the defendant, to deliver the deed to the plaintiff, except on the express agreement that the appeal was not thereby to be prejudiced, and of this from both Mr. *Williams's* affidavits, that of the 24th as well as that of the 21st January, it appears that Mr. *Atkinson*, and through him the plaintiff, and *McCallum*, the purchaser from the plaintiff, for whom Mr. *Atkinson* also acted as solicitor, had notice. This is sufficient in my opinion, to dispose of all objections to the motion founded on the delivery of the deed, and the rights of the purchaser derived under it, for

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if Mr. *Williams* had authority only to perfect it by delivery, on the conditions referred to, it is clear that Mr. *Campbell*, the defendant's solicitor, had no authority to dispense with that term; and it is not pretended that the defendant himself ever authorized an absolute delivery, so that, beyond all question, the delivery must have been subject to the original condition attached by the defendant. It, therefore, becomes immaterial, in my judgment, to consider what passed between Mr. *Atkinson* and Mr. *Campbell*, or what were the terms on which Mr. *Atkinson* professed to accept the deed, and I grant the motion on payment of costs. The appeal to be brought to a hearing at the June sittings of the Court of Appeal.

McDermott v. McDermott.

Noting pro confesso, effect of.

A bill was filed impeaching a patent as having been obtained wrongfully; the defendants were the patentee and his vendee, who had not paid all his purchase money. The patentee answered denying the equity claimed; his vendee allowed the bill to be noted *pro confesso*: *Held*, that the plaintiff failing to establish his case against the patentee the bill should be dismissed against both defendants.

[March, 1870.]

Mr. *C. Moss* applied for leave to answer.

Mr. *J. Hoskin*, contra.

Judgment.

Mowat, V. C.—The plaintiff in this case claimed by his bill to be equitably entitled to certain property described in the bill, and for which, he alleges, that the defendant, *William McDermott*, wrongfully obtained a patent in his own name. *John Brooks* was made a defendant as having purchased from the defendant, *William McDermott*, and not having paid his purchase money. The bill also charges him with having had notice of the plaintiff's equity at and

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before the purchase. It alleges a conveyance to *Brooks* by *William McDermott*, and a mortgage back for the purchase money. No case is made for relief against *Brooks*, except through the case made by the bill against his vendor. *William McDermott* put in an answer denying the plaintiff's equity: *Brooks* allowed the bill to be taken *pro confesso* against him. At the hearing at Hamilton, I held that the plaintiff had failed to establish his case against *William McDermott;* and I therefore dismissed the bill as against him with costs. But, *Brooks* having confessed the plaintiff's case, I intimated that there should be a decree against him; the effect of which was, to give to the plaintiff the equity of redemption, subject to the mortgage to *William McDermott*. The decree has not yet been drawn up, and *Brooks* has moved for leave to file an answer now, on affidavits in which he gives an explanation of the cause of his not answering before.

Judgment.

In considering this motion it has occurred to me that I was wrong in making a decree against *Brooks*, even though by not answering he had admitted the bill to be true. The plaintiff set up no right against him except by making him out to be subject to the plaintiff's alleged equity against *Brooks's* vendor. *Brooks* admitted the plaintiff's case as a whole; and was content to abide by the result of the case as between the plaintiff and his vendor; and why, in such a case, should an answer by him be essential? If a vendee, from information which has come to him after his purchase, believes that his vendor had no title, would his admission that he so believes entitle an adverse claimant to a decree against him, when such claimant failed to make out his case against the vendor? Clearly not, I should say; and if an admission of *Brooks's* belief, made by answer or on examination, would not entitle the plaintiff to a decree against him alone, a noting *pro confesso* can have no greater weight. In *Carfrae* v. *VanBuskirk* (*a*),

(*a*) 1 Gr. 539.

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the bill was in respect of certain completed contracts, and was filed against three partners by a person who claimed to be entitled to a share of the profit as a co-partner. The plaintiff proved admissions of his right by two of the three defendants, but it was held that no relief could be granted against the two, excluding the third. That case appears to apply in principle to a case like the present. So, at law, in case of an action against three persons jointly, if one of the three suffers judgment to go by default, and the other two plead *non assumpserunt*, I understand the rule to be, that if the plaintiff fails on the plea, he fails against all three, notwithstanding the admission on the record by the third (*a*). I was counsel for the plaintiff in *Carfrae* v. *Van-Buskirk*, and I recollect thinking that the case went too far; and that the defendants who admitted the plaintiff's claim, should in equity be made to pay their proportion of it, as there was no injustice to these defendants in giving the plaintiff that limited relief. But in the present case, the plaintiff was by his own bill entitled to nothing unless he established his case against *William McDermott*: all that the plaintiff claimed, or could claim, against *Brooks*, was, that *Brooks* should not be allowed to obstruct the remedy which, but for the sale to him, the plaintiff would have had against *McDermott*.

Judgment.

Brooks's motion for leave to put in an answer could only be granted without prejudice to the decree already made in favour of *William McDermott*; and in that case no good could result from a hearing at the next sittings as between the plaintiff and *Brooks*. For if the answer had been filed before the trial at Hamilton, the bill (I now perceive) would necessarily have been dismissed against both defendants, though the plaintiff had been able to establish clear admissions by *Brooks* as to the statements of the bill; and now that the bill has been dismissed against *William McDermott*, if *Brooks* were allowed to

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(*a*) Eliot v. Morgan, 7 C. & P. 334.

answer, the result, so far as I see, must inevitably be the same as to *Brooks* whatever the evidence should be. 1870. McDermott v. McDermott.

Unless, therefore, counsel for the plaintiff should desire to speak to this point, the bill will be dismissed against *Brooks*, as well as *William McDermott*, without costs to the former, and with costs to the latter. The decree may be dated as of the day on which this judgment is given; it will state reservation of judgment at the hearing: then *Brooks's* motion on the 15th; and the decree to-day, refusing the motion and dismissing the bill against both defendants, with costs as respects *McDermott*, and without costs as respects *Brooks*.

No costs of the motion.

In re Toms & Moore, Solicitors.

Solicitors, liability of—Partners—Summary jurisdiction.

Mortgages were delivered to a solicitor by his brother for collection, and the money was collected thereon. A dispute arose as to whether such solicitor was alone responsible to his brother, or whether the solicitor's partner was responsible also for the moneys collected. On petition of the client for payment of the money, the Court refused to make an order against the partner, holding that the petitioner should be left to bring a suit at law or in equity as he might be advised.

[March 18, 1870.]

This was an appeal from a decision of the Secretary. The solicitors named were partners; the petitioner was a brother of one of them, and had given to his said brother certain mortgages for collection; moneys were received on these mortages, as it was contended on the one side, for the benefit of the firm, on the other, as it was alleged, by the brother of the petitioner only, and for his benefit. The brother of petitioner had been examined, and his depositions formed part of the case in support of the petition. The Statement.

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Secretary made an order for payment against both partners. Against this the parties appealed, and the matter came on before *Mowat*, V. C.

Mr. *J. Hoskin* in support of the appeal. The order is resisted on the grounds that the money has not been received in the capacity of solicitors, the collection of mortgages is carried on by land agents and brokers extensively, and the petitioner employed his brother in that capacity, in so doing he ran his own risk, and did not employ his brother's partner at any time. Even if both were employed it was only as brokers or agents, and no ground would exist for the exercise of the summary jurisdiction of the Court, the money not being received in the character of solicitors by both or either of them, the only remedy was by an action at law. He cited on this point *Ex parte Hicks* (*a*); *Ex parte Bull* (*b*); *Daniell's* Practice (*c*); *Tidd's* Practice (*d*).

Argument.

The case, if even it came within the summary jurisdiction of the Court, was suspicious in its features as far as it was sought to effect *Toms*, and the order as against him must be considered bad. The other partner who had received the moneys, and afterwards absconded, had returned to the Province, and now by colluding with his brother, the petitioner, sought to make his innocent partner pay for his default. If any case required to be looked into it was this; the present proceeding had been set on foot by the defaulting party, and as far as the case was sustained by his deposition it was entitled to no weight. He cited *Re Lawrence* (*e*), *Sims* v. *Brutton* (*f*), *Re Atkin* (*g*), *Bondella* v. *Roche* (*h*), *Bishop* v. *Coventry* (*i*), *Ex parte Dufair* (*j*), *Viney* v. *Chaplin* (*k*), *Re Blanchard* (*l*), *Harman* v. *Johnson* (*m*).

(*a*) 2 Deac. & Chit. 575.
(*b*) 3 Deac. & Chit. 119.
(*c*) P. 1693.
(*d*) P. 88.
(*e*) 23 L. J. Chan. 791.
(*f*) 5 Exch. 806.
(*g*) 4 Barn. & Ald. 49.
(*h*) 27 L. J. ch. 681.
(*i*) 2 Drew. 143.
(*j*) 2 DeG. McN. & G. 246.
(*k*) 2 DeG. & J. 468.
(*l*) 3 DeG. F. & J. 157.
(*m*) L. J. 22 Q. B. 297.

1870.

Re Toms & Moore.

Mr. *Moss*, contra.—He had conceded before the Secretary that the evidence of *Moore* unsupported should be scrutinized, and he only sought now that it should be received where supported; but this was no reason why the petitioner should not get the relief he asked, if under all the circumstances he could make out a case that would entitle him to sustain the order of the Secretary. It had been objected that no notice of reading the depositions of *Moore* had been given in the notice of motion. This objection was untenable; the petitioner has to file his petition and affidavit; then an affidavit in reply is filed, which affidavit can be replied to by the petitioner. In reading the depositions he is doing no more now. If any objection could be urged that the examination of *Moore* could be used only against himself and not against *Toms*, it was clearly waived by notice being given to *Toms*, and his appearing by counsel who acted for him throughout the examination, and cross examined *Moore*. *Toms* was amenable to the summary jurisdiction of the Court. The moneys received on the mortgages spoken of had passed through the books of the said firm of solicitors, and *Toms* knew of it. This is not supported by *Moore's* statement alone; the books of the firm show it, and they are good evidence against both parties. Part of the mortgage was paid in furniture, and formed part of the furniture of *Toms* at this moment. The *Anderson* mortgage is still plainer; it passed through the books of the firm, and went to the credit of the firm at the bank. The *McLean* mortgage the same; that was by a tailor, and was paid by contra accounts against both parties. The criterion of whether the parties were acting as solicitors or not, was the prevailing custom of the profession in this country; here it was always usual for them to deal with mortgages, and to collect them, and to invest money in them, and it was generally left to the discretion of the solicitors without specific instructions. He cited ——— v. ——— (*a*); *St. Aubin* v. *Smart* (*b*); *Re Walker* (*c*); *Re Carroll* (*d*).

Argument.

(*a*) 2 L. R. Eq. 570.
(*b*) 5 L. R. Eq. 183, S.C. 3 Ch. Appl. 646.
(*c*) 2 Chan. Cham. Rep. 324.
(*d*) 2 Chan. Cham. R. 323.

1870.

Re Toms & Moore.

[The VICE CHANCELLOR.—Has not the Court a wide discretion in the matter and should I not take into consideration that this is in effect the application of the defaulting partner?] I grant it and I feel the difficulty that places me in: but the petitioner has his rights. If it is conceded that *Moore* initiated the proceedings, the petitioner has since confirmed them; but I do not admit that your Lordship can investigate motives, if the right I contend for exists, it is immaterial to look into or question motives.

Mr. *Hoskin*, in reply referred to *Lawrence's* case. The evidence of petitioner himself brings the case within that authority. The exercise of the summary jurisdiction is founded on misconduct, no misconduct is shewn as against the partner *Toms*. The question of the inadmissability of the depositions is not met, and it is evident all the dealings were with *Moore* alone. [THE VICE CHANCELLOR.—It seems that *Toms* denies there were entries in the books of the firm as to these transactions, and is not that sufficient to let in evidence to show that there were?] *Simons* v. *Britton* (*a*). The English authorities all go to show that it is not the business of attorneys to invest mortgage moneys, and here in the absence of authorities the same rule should govern. The chief business of that kind done here is by brokers.

Judgment.

MOWAT, V. C.—This is a petition by *John Warren Moore*, brother of the respondent *Moore*, setting forth that the respondents were in partnership as solicitors in 1864, and for some years afterwards; that the petitioner placed in their hands as his solicitors for safe keeping and collection certain mortgages which the petition specifies; that they collected the sums secured thereby, and applied the same to their own use, and refused to pay to the petitioner any part thereof; that the professional fees and charges to which the respondents may be entitled against the petitioner, relate exclusively to the

(*a*) 5 Ex. R. 802.

collection of these mortgages, and amount to much less than the money received on the mortgages; that the respondents have not delivered to the petitioner any bill of their said fees and charges, if any, or any account of the moneys received by the respondents as aforesaid. The prayer is, that they may account to the petitioner in respect of the sums they have received; that they may be charged with interest thereon; that they may deliver to the petitioner a bill of their costs, if any, against the petitioner; that the same may be taxed; that the respondents may be ordered to pay to the petitioner the balance, which shall be found due to him; and to deliver up books and papers; and for further relief. This petition is verified by the affidavit of the petitioner.

1870.

Re Toms & Moore.

On cross-examination upon his affidavit, the petitioner admitted that all his communications during the period in quesion had been with the respondent *Moore*, who is his brother; and that the latter is the petitioner's adviser and solicitor in the matter of the petition, though his name does not appear as such on the papers. The real question between the parties is, whether the money mentioned in the petition was received by the respondent *Moore* as agent for the firm of *Toms & Moore;* or whether Mr. *Moore* alone is responsible for it to the petitioner.

Judgment.

The other respondent has filed an affidavit, denying the petitioner's allegation that the mortgages were placed in the hands of the firm as his solicitors for safe keeping and collection; and alleging, that the only transaction which the firm had ever had with the petitioner was an action at law which they brought for him on a promissory note in February, 1865; that except in that action at law the deponent was not, nor was his firm, ever retained by the petitioner in any way; that the deponent has not received any money belonging to the petitioner, or any benefit therefrom; that until after the transactions in question the deponent never had any communication with the petitioner by letter or other-

1870.

Re Toms & Moore.

wise; that neither the deponent nor the firm ever received any communication from the petitioner; that the only letter to the petitioner which the deponent finds in the letter-book of the firm is one which he sets forth, and is a letter by the respondent *Moore* in his own name; that the account books of the firm were kept by the respondent *Moore*; and that an account is opened therein for the petitioner, but that it was opened without the deponent's knowledge or consent. His affidavit also alleges that his co-respondent went to the United States in June 1868, taking with him money and securities which belonged to the firm, and which he was not entitled to take. It appears that this absence was temporary, and that Mr. *Moore* has since been appointed Deputy Judge in the county where he now resides.

Judgment.

In reply to the affidavit of Mr. *Toms*, the respondent, Mr. *Moore* was examined on the part of the petitioner *viva voce*, and he stated the facts to be as the petition sets forth, and not as Mr. *Toms's* affidavit alleges. The books of the firm appear to have been produced at his examination, and he shewed from them that he had entered therein the sums which he received for the petitioner; and that they were either paid to the credit of the firm's bank account, or that the firm in some other way got the benefit of them. He also stated that the transactions took place, and the entries relating thereto in the books were made, with the knowledge and concurrence of Mr. *Toms*. An objection was taken to this deposition as not being in reply, as being merely in support of the allegations of the petition; and, as to the greater portion of the deposition, the objection seems to be well founded.

The following is the opinion given by the Judge's Secretary when the application was before him:

"Following the authorities *Re Carroll* (*a*), and *Re Walker* (*b*), I think the Court can exercise its summary

(*a*) 2 Chan. Cham. R. 323. (*b*) 2 Chan. Cham. R. 324.

1870.

Re Toms & Moore.

jurisdiction in the present case. Excluding entirely the evidence of *Moore*, there is sufficient in the affidavit of *Toms* to shew that some money was received by the solicitor for the petitioner. Mr. *Toms* should have an opportunity of explaining, if he can, the evidence given by *Moore;* and under the order I propose to make he will have an opportunity of doing so. As against *Moore*, the petitioner can have an order for payment of the amount specified in the prayer of the petition. As against *Toms*, the evidence is not sufficiently clear as to the exact amount received by the firm; and I therefore direct an enquiry as to what moneys have been received by the firm from or on account of the petitioner, and a taxation of any costs which may be due them from the petitioner, one to be set off against the other. The party against whom the account may be found, to pay the balance found due in twenty-one days. Costs to be taxed to the party in whose favour the account is found. As the solicitors live at Goderich and their books are there, it may be most convenient to direct a reference to the Master there."

Judgment.

I believe that I concurred in this opinion at the time the order was made; but, on reading Mr. *Toms's* affidavit carefully, I do not find that it does admit the receipt by the firm of any of the moneys mentioned in the petition, but only of the sum recovered in the action at law, as to which the petition sets up no claim. The learned counsel for the petitioner suggested on the appeal, that the entries which were made by the co-respondent in the firm's books, and which his deposition informs us of, may be looked at, though his depositions otherwise are rejected. But the evidence drawn from the books seems open to the same objection as the deposition is, viz., that it is too late to put it in by way of reply, the respondent having no right to file affidavits in rejoinder by way of explanation or otherwise. The entries are not conclusive. It was mentioned in *Sims* v. *Brutton* (*a*), that such entries are mere facts from which a jury may have

(*a*) 5 Exch. 806.

1870.

Re Toms & Moore.

to say whether the objecting partner had the knowledge which is necessary to charge him. There, a case had been stated for the opinion of the Court, the Court was to draw any inferences which a jury ought to draw, and the Court declined to draw from the entries the inference desired.

The circumstances under which a solicitor is liable for money received by his partner were discussed before me, and several cases were cited. The principal of them are referred to in the later case of *The Earl of Dundonald* v. *Masterman* (*a*). But considering that, in the present case, the question depends on disputed facts (*b*), I think that, so far as Mr. *Toms* is concerned, the petitioner, under the circumstances, should have been left to bring his suit at law or in equity (*c*) as he might be advised. In such a suit, if he succeeds, he may get interest, which his petition prays for, but which has been refused where a party proceeds in this summary way (*d*).

Judgment.

The petition is framed with a view to the petitioners relying either on the general jurisdiction of the Court, or on the statute (*e*); but the real object of it plainly is to obtain an order against *Toms* for the moneys received by the co-respondent; and the right under the Statute to an order to tax does not of necessity carry with it a right to an account of all moneys which a solicitor may be charged with having received for the petitioner (*f*), though the line of distinction is perhaps not always very definitely marked (*g*). The petition does not allege that any costs claimed by the respondents were incurred in this Court; or, indeed, that

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(*a*) L. R. 7 Eq. 504.

(*b*) See St. Aubin v. Smart, L. R. 3 Ch. App. 646, 650; Re Millard, 1 Dowl. P. C. 140.

(*c*) See Atkinson v. McBeth, L. R. 2 Eq. 570; St. Aubin v. Smart, L. R. 5 Eq. 183: S. C. 3 Ch. App. 646; Earl of Dundonald v. Masterman, L. R. 7 Eq. 504, and other cases there cited.

(*d*) Jones v. James, 1 Beav. 307 See Re Savery, 13 Beav. 424.

(*e*) Consol. U. C. 22 Vic. ch. 35, sec. 35.

(*a*) Re Smith, 4 Beav. 312; 9 Beav. 182.

(*b*) Cooper v. Ewart, 2 Ph. 362; Re Savery, 13 Beav. 424.

the respondents make, or ever made, any claim against him for costs, or are entitled to any costs; and that such looseness of statement is a fatal defect, appears from the observations of Lord Justice *Turner* in *Re Forsyth* (*a*). Mr. *Toms*, on the other hand, swears that the only costs which his firm ever had against the petitioner were the costs of the action at law which they brought for him four years ago, and the money in which was recovered and invested for the petitioner by the co-respondent; and these costs I understand to have been settled long ago, and not to be the subject of any question between the parties now. 1870. Toms v. Moore.

On the grounds thus indicated, I discharge the order appealed against, so far as it affects Mr. *Toms*.

Seeing that the Court has a discretion in regard to these applications (*b*). I am not sure but the co-respondent's connection with the case, as the petitioner's adviser in the matter of the petition, and as his solicitor in it, though the name of another solicitor is used, would have been a sufficient ground for refusing an order; for, while thus acting for the petitioner, he, on the other hand, is in one sense, the principal respondent, was the actual receiver of the money, is liable for it in any event (whether solely or jointly with Mr. *Toms*), and has left unanswered certain sworn statements of Mr. *Toms* which, in view of the consideration to which I am adverting, were perhaps not immaterial. Judgment.

Mr. *Toms* should have the costs of the original application; and there will be no costs of the appeal.

(*a*) 2 DeG. J. & S. 514.

(*b*) Ex parte Hicks, 2 Deac. & Ch. 575; &c.

1870.

OSTRANDER v. OSTRANDER.

Staying proceedings where former action pending.

Where a former action of ejectment had been brought and decided on the merits, and no real or probable cause of suit was sworn to in the suit moved in; an order was granted to stay proceedings until the costs of the action of ejectment were paid.

Mr. *Hamilton*, for the defendant, moved for an order that plaintiff pay or give security for costs, and that this suit be stayed in the meantime, on the ground that an action of ejectment had been brought which involved the same question as was at issue in this cause. He cited *Follis* v. *Todd* (*a*), *Whaley* v. *Whaley* (*b*), *Casey* v. *McColl* (*c*).

Statement.

Mr. *J. A. Boyd*, contra, objected that it should have been shewn on part of defendant what was the present state of the cause. For aught that appeared the defendant might have answered, and thus waived the right to security for costs. The onus of shewing that he had not, was on the defendant: *Torrance* v. *Gross* (*d*).

Mr. *Hamilton*, in answer to this objection, shewed that no answer had been filed, and contended that the present suit must be held to be vexatious. He produced a certified copy of the proceedings in ejectment to shew that the same issue arose in that and in the present suit.

Mr. *Boyd* relied on his objection as to the absence of a certificate of state of cause, and also that no merits were sworn to except in the affidavit of the plaintiff's solicitor. Contending that the client should himself pledge his oath to the merits of his cause and the vexatious nature of the proceedings complained of. He

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(*a*) 1 Cham. R. 288.
(*b*) 3 Cham. R. —.
(*c*) 3 Cham. R. —.
(*d*) 2 Prac. R. 54.

argued also that the time for answering had expired, and that the plaintiff might have taken the bill *pro confesso*. 1870. Ostrander v. Ostrander.

THE SECRETARY refused the application, referring, in giving his decision, to *Cobbett* v. *Warner* (*a*).

From this decision the defendant appealed, and the motion came on to be heard before *Strong*, V.C.

Mr. *Hamilton*, for the defendant, appealing, took the same grounds as before the Secretary, objecting further that the Secretary's order limited a time in which defendant should answer. He cited in addition to the cases referred to above: *Hoare* v. *Dickson* (*b*), *Cobbett* v. *Warner* (*c*), *Winter* v. *Hamburg* (*d*), *Cole* on Ejectment (*e*), *Jones* v. *Capreol* (*f*), *Barker* v. *Smart* (*g*).

Mr. *J. A. Boyd*, contra, urged the objection taken on the former argument, and as to the objection, that the order of the Secretary limited a time for answering: he remarked that it contained a stay of proceedings of which the defendant had availed himself, and he thus waived any claim for security. The defendant had not made a sufficient case: he might have had an exemplification of the notice of title in the ejectment case, and shewn the issue raised there. The present bill raised issues that could not have been tried at law; and could not, therefore, be for the same cause of action. He cited *Bell* v. *Cuff* (*h*), *Dawson* v. *Morgan* (*i*), *Ruttan* v. *Smith* (*j*). Argument.

Mr. *Hamilton*, in reply. No cases have been cited to shew that even after answer such a motion could not

(*a*) 2 L. R. Q. B. 108.
(*b*) 7 C. B. 164.
(*c*) 2 L. R. Q. B. 108.
(*d*) 1 Chan. R. 123.
(*e*) 522.
(*f*) 4 U. C. Q. B. O. S. 227.
(*g*) 11 Beav.
(*h*) 4 Prac. R. 155.
(*i*) 17 C. B. 184.
(*j*) 1 Cham. R. 184.

1870.

Ostrander v. Ostrander.

le granted. The application for time for answering was part of the former application to the Secretary, and was not a substantive application for time, and could not be taken as a waiver of any right he had to security or stay of proceedings.

STRONG, V.C.—I do not think it any sufficient objection to this motion that defendant has not shewn the state of the cause. I can look at the office-copy bill, and can also, if necessary, call for a certificate of state of cause. The Court can always inform itself of the state of its own records by the certificate of its own officers.

I think the fact of the time for answering being limited in the order made by the Secretary refusing the application, no ground of objection. It was part of the refusal of the motion before him—not time given on an independent motion. I think defendant entitled to an order to stay proceedings in this cause until the costs of of the action of ejectment are paid.

Judgment.

I have read *Casey* v. *McColl* (*a*), a decision in which as far as it applies in the present case, I entirely concur; and I agree in considering that, as is laid down in *Cobbett* v. *Warner* (*b*), such a jurisdiction is to be sparingly used. But I think in this case the affidavit of Mr. *Allen* sufficiently shews the causes of action to be identical, and that the same matters now in question were in question in the ejectment suit. The ejectment here appears not to have been decided on any technical point, but on the merits which distinguishes this case from *Casey* v. *McColl;* and lastly, there is not here any affidavit on the part of the plaintiff shewing "real or probable cause of suit," as it is expressed in *Cobbett* v. *Warner*. So that the *primâ facie* presumption of vexation is not removed.

Motion granted.

(*a*) 3 Cham. R. 24. (*b*) 2 L. R. Q. B. 108.

FLEMING v. DUNCAN. 1870.

Rehearing.

A motion for leave to rehear notwithstanding more than six months will have elapsed from the date of the decree before the then next hearing term was granted, where it appeared that judgment had been given but a short time previous to the last rehearing term.

Mr. *Lash* moved for leave to rehear this cause notwithstanding that six months will have elapsed from the date of the decree before the next rehearing term.

Mr. *Spencer*, contra, urged first, that the case was not a proper one for rehearing; and next, that there was no reason why the case should not have been set down for the last rehearing term. He cited *Coates* v. *McGlashan* (*a*), *Gilbert* v. *Jarvis* (*b*), *Denison* v. *Denison* (*c*).

THE SECRETARY considered that there had been scant time to go down to rehearing at the past rehearing term, and granted the order.

ROMANES v. FRASER.

Rehearing.

A vacancy occurring on the Bench was deemed a sufficient reason for not rehearing at the first rehearing term after the decree drawn up; and the time was on application extended.

Mr. *S. H. Blake*, moved on behalf of defendant, *Archibald Fraser*, for an order for leave to rehear, notwithstanding the time for rehearing had elapsed. Owing to the vacancy on the Bench it had been impossible to rehear it at the last term, and the defendant from poverty had not been able to raise the deposit of $40 before.

(*a*) 2 Chan. Cham. Rep. 218. (*b*) 2 Chan. Cham. Rep. 259.
(*c*) 2 Chan. Cham. Rep. 333.

1870.

Romanes v. Fraser.

Mr. *E. Henderson*, contra, objected, first, that several persons made parties in the Master's office had not been notified. He also urged that great delay had taken place since the decree was pronounced.

Leave to rehear granted on payment of 10*s*. costs.

CAMERON v. WOLF ISLAND CANAL COMPANY.

Rehearing after six months had elapsed.

Where it was shewn that a decree not enrolled, which had been pronounced in 1855 was clearly erroneous, an order was made for rehearing the cause notwithstanding the lapse of time.

Mr. *Crooks*, Q.C., moved for leave to rehear, more than six months having elapsed since the decree was pronounced—the decree was made in 1855. The decree, which was not enrolled, provided for the sale of the defendants' property. Mr. *Crooks* shewed, that the only decree which could be pronounced was the appointment of a receiver; that the land of a canal, used for canal purposes, could not be sold. He cited *Potts* v. *Warwick Canal Co.* (*a*), followed in this country in *Galt* v. *Erie and Niagara Railway* (*b*). The error was patent on the face of the decree.

Mr. *Edgar* appeared for the *Provincial Insurance Co.*, who had proved a claim against the defendants as creditors.

THE SECRETARY allowed the case to be reheard, notice of rehearing to be served on the Canal Company.

(*a*) 1 Kay 142. (*b*) 14 Grant 499.

1870.

KAHN v. REDFORD.

Examining parties.

The Court will take into consideration the fact that parties can be more efficiently examined in Toronto than in some outer counties, and will not consider alone the balance of convenience of the parties or solicitors attending.

An application to change the examination from Stratford to Toronto was granted, although no great difference was shewn as to the convenience of the parties interested, on the suggestion (without affidavits) that the examination could be more efficiently and expeditiously conducted in Toronto.

Mr. *S. H. Blake*, moved for an order for the defendant to attend in Toronto for examination, instead of at Stratford, on the ground that he could be more efficiently examined in Toronto. He did not put in any affidavits as to this point, as he understood from the judgment of the Chancellor in *Gallagher* v. *Gardiner*, reported in this volume, that the Judges would take judicial notice of want of experience of their officers. The affidavits shewed that the bill was filed in Toronto —the defendant lived in Stratford,—that a person coming from Stratford to Toronto would have three quarters of an hour longer in the city than a person going to Stratford, if he wished to return to his residence the same day. He wished it to be understood, however, that he did not apply merely on the ground of convenience. Statement.

Mr. *Moss*, contra, contended that the whole question was one of convenience, and it was very inconvenient for his client, a member of parliament, to come to Toronto on the eve of a parliamentary session.

The Secretary granted the application.

1870.

FELAN v. MCGILL.

Cross-examination upon an affidavit.

The right of cross-examination upon an affidavit under Order 268, applies to cases where the affidavit has not yet been, but is about to be used. Where therefore an appointment had been taken to examine a defendant on an affidavit which had been already used on a motion for injunction, the appointment was on motion set aside.

Mr. *Thomas Moss*, moved to set aside an appointment for the examination of the plaintiff. A motion for injunction had been previously made, in support of which the plaintiff had filed the affidavit on which it was now sought to cross-examine him. The injunction had been granted and a receiver appointed, and defendant had filed no answer.

Mr. *Moss* urged that the matter as to the affidavit was now at an end, and no examination could take place. The provision in the order is that the examination shall be on affidavits "to be used, or which shall be used," it could not be construed as if it had been "shall have been used:" he cited *Lloyd* v. *Whitty* (*a*), *Catholic Publishing Company* v. *Wyman* (*b*), *Hooper* v. *Campbell* (*c*).

Mr. *A. Hoskin*, contra, contended that a party having made an affidavit was liable to cross-examination on it at any time. He referred to the language of the Orders before they were consolidated.

THE SECRETARY pointed out that section 9 of the former order was omitted in the Consolidated Orders, and granted the motion to set aside the appointment.

(*a*) 19 Beav. 57. (*b*) 11 W. R. 399. (*c*) 13 W. R. 1003.

CARTER v. ADAMS. 1870.

Amending, effect of—Answering amended bill.

Amending a bill does not necessarily give a defendant who has answered the original bill fresh time to answer.

Where amendments had been made by adding parties, and not affecting the original defendant who had answered, an application by such defendant to take the replication off the files and strike the cause out of hearing list because he had not had time to answer was refused.

Mr. *Chadwick* moved on notice to take the replication off the files, and to strike the cause out of the list of causes set down for hearing at Stratford on the ground that after an amendment the replication had been filed without allowing the time for answering to expire. He also asked leave to come in and answer notwithstanding the noting *pro confesso* on the ground that the defendant had failed to put in his answer only by reason of the snow storms of the previous week.

Mr. *A. Hoskin*, contra, shewed that the replication had been filed originally regularly and the cause heard—the defendant now moving being a party thereto and having answered. At that hearing an order was made to amend the bill by adding parties. The new parties had been added and had answered, and the new replication had been filed as to them only—the original replication being as to the defendant now moving. He cited *Chisholm* v. *Sheldon* (*a*), *Johnson* v. *Cowan* (*b*), *Gillespie* v. *Grover* (*c*). The defendant had also delayed moving to strike out the cause until the last day. This was too late, *Fenton* v. *Cross* (*d*). As to want of notice of filing replication, he cited *Lloyd* v. *Solicitor's Life Insurance Company* (*e*).

The Secretary refused the application with costs.

(*a*) 1 Gr. 294
(*b*) 2 Ch. Rep. 13.
(*c*) 2 Gr. 120.
(*d*) 3 Weekly Rep. 240.
(*e*) 1 Ch. Rep. 25.

1870.

McPherson v. McPherson.

Subpœna to Province of Quebec.

Before a subpœna will be issued to the Province of Quebec it is necessary to shew that no suit is pending in that Province for the same cause of action.

An application was made for a subpœna for the Province of Quebec. It was not shewn that no suit was pending in that Province for the same cause of action.

The Secretary required an affidavit establishing this fact before ordering a subpœna to issue.

James v. James.

Changing venue.

The Court will not change the venue merely to enable a plaintiff to speed his cause, the more especially if the plaintiff has himself been guilty of delay in proceeding.

Mr. *J. A. Boyd* moved for an order to change the venue from Stratford to Guelph.

Mr. *C. Moss*, contra, urged that there would be much greater expense in hearing the cause at Guelph than at Stratford.

Mr. *Boyd* said that he would undertake to pay the extra costs.

Mr. *Moss* urged that the great delay of the plaintiff should prevent any indulgence being given to him. There was only fourteen days to get down to Guelph, and the defendants had to subpœna witnesses from the United States, and there would not be time to get them.

THE SECRETARY said that he did not think that the Court would change the venue merely to speed the cause, unless it was shewn that the plaintiff was in danger of losing his debt, which was not shewn here. 1870. James v. James.

Application refused with costs.

WALKER v. NILES.

Interpleader—Sheriff—Costs.

Two writs were in the hands of the sheriff, and while an interpleader order was pending he was served with a notice to return one of the writs; and not having done so an application was made to compel him to make a return. Under the circumstances the Secretary enlarged the time for making the return, and made no order for costs.

It is the sheriff's duty before making application for an interpleader order to make some inquiry as to the nature of the claim, and if he has not done so, he will be ordered to pay costs.

Where an interpleader order is pending the Court will in its discretion enlarge the time for returning writs in the sheriff's hands.

Mr. *Macdonald* moved for an order for the sheriff of Northumberland and Durham to return a writ of *fi. fa.* goods. He contended that he was entitled to such an order almost as of course, as he would be to a rule at common law, and if it was disobeyed he would be entitled to an attachment as of course; and the sheriff could only free himself from responsibility by returning the writ and paying costs (*a*). Statement.

Mr. *Boswell*, for the sheriff, urged that the delay had been caused by negotiations with the plaintiff's solicitor. The application resolved itself into a question of costs, which he contended should not be paid by the sheriff.

(*a*) Lash's Pr. 591; Chitty's Pr. 625.

1870.

Walker v. Niles.

THE SECRETARY.—The sheriff has in his hands two writs, and he has seized goods as to which an interpleader order is now pending. He has been served with a notice under the statute (*a*) to return one of these writs, and not having done so within the time limited, the application is made to compel a return, and for payment of the costs of the notice and of this motion.

The affidavits filed are conflicting in their statements as to what has passed between the sheriff and the solicitor, or a clerk of the solicitor. Looking at the facts disclosed I do not think I should order the sheriff to return the writ. Indeed I do not see how he can at present make a return. He has seized under one of the two writs, and that, as I understand, is in effect a seizure under both. A claim has been made to the goods seized and an application for an interpleader order is now pending, and until that is disposed of he cannot make a return. I do not see how I can say that the sheriff under all the circumstances "wilfully refuses or neglects" to make his return, and under the statute it seems to be only where that is the case, that he can be ruled and formally proceeded against.

Judgment.

I find in *Archibald's* Practice (*b*) that the time limited for making the return may be enlarged, and that this is granted where the justice of the case requires it for the sheriff's protection; and that it is often granted where there are adverse claims to the goods seized. I think this is just a case in which the time should be enlarged, and that I can enlarge it on this application. In one case, *Wells* v. *Pickman* (*c*), where proceedings had to be taken on the execution to try a question as to an extent,—by which the goods were said to be bound, the time was enlarged until the second day of the next

(*a*) 27 & 28 Vic. 8 ch. 2 sec. 34. (*b*) 12 ed. 628.
(c) 7 T. R. 174.

term. Here I propose to enlarge the time until eight days after the proceedings on the interpleader are disposed of. 1870. Walker v. Niles.

I make no order as to costs.

The sheriff applied for an interpleader order when the execution creditor relinquished any claim as to the property claimed by two parties as against the sheriff.

THE SECRETARY.—On the sheriff's application for an interpleader order, the execution creditor relinquished any claim as to the property claimed by two of the claimants, being satisfied that they were entitled to hold it as against the execution. These two persons now claim their costs as against the sheriff. It does not appear from the affidavits filed that the sheriff was directed by the solicitors of the execution creditor to seize the particular property claimed by them, nor that he, before applying either made any inquiry as to the particulars of their claim, or informed the solicitor of the execution creditor of it. Under these circumstances I think the sheriff should be ordered to pay the costs. The rule of law is, that the sheriff will be ordered to pay costs if he did not before making the application make some inqiries as to the nature of the claim, *Re Sheriff of Oxfordshire* (*a*), *Bishop* v. *Hinxman* (*b*). In this Court the rule seems to be the same. In *Dutton* v. *Furniss* (*c*) the Master of the Rolls said that a sheriff could not file a bill of interpleader until he had asked the judgment creditors whether they claimed the goods he had seized, and as he had not done so he was ordered to pay the costs. As to the other claimant, there will be an issue in the usual form. Judgment.

(*a*) 6 Dowl. 186. (*b*) 2 Dowl. 166.
(*c*) 1 W. N. 153.

1870.

MEIN v. MEIN.

Provincial Lunatic Asylum Act—Authority of Bursar.

On an application by the Bursar of the Provincial Lunatic Asylum for moneys in Court belonging to a lunatic party in a suit, in which his property had been sold, *Held*, that such application was not authorized by the statute: Consol. Stat. U. C. cap. —

The bill in this cause was filed by a brother and sister of the defendant *John Mein*, a person of unsound mind, not so found by inquisition, but now and for some time past a patient in the Provincial Lunatic Asylum. The bill set out that the father of the parties had made his will by which his lands were charged with legacies in favor of the plaintiffs, and then devised to *John Mein*. The lands had been sold under the decree of this Court, the legacies satisfied, and a balance of $161 remained in Court to the credit of the lunatic.

The Bursar of the Asylum now applied by petition, setting out these facts, and that a sum in excess of that in Court was due to him for past maintenance; and he prayed that the moneys now in Court, and further sums as they came in, might be paid out in satisfaction of the charge for maintenance, which is $2 per week.

Mr. *J. C. Hamilton*, for the petitioner.

Mr. *J. A. Boyd*, for the guardians *ad litem*.

THE SECRETARY.—I refuse this application with costs. The case does not come within the clause of the statute referred to at all; and my impression is that the Bursar must stand in the same position as any other creditor.

1870.

McEwan v. Boulton.

Swearing affidavits in a foreign country.

An affidavit sworn before a commissioner for taking affidavits in the English Court of Chancery, at Glasgow, was held to be insufficiently sworn.

[March, 1870.]

Mr. *Smart* moved for an order for a new and better affidavit on production, on the ground that that filed was sworn at Glasgow before a commissioner of the English Court of Chancery for taking affidavits in Scotland. He urged that this was insufficient under the Foreign Affidavit Act; also, that there was no evidence that the person administering the affidavit was such commissioner as the jurat purported that he was. That the jurat did not shew where "Scotland" was; it should have stated it as "that part of Great Britain and Ireland called Scotland;" and the schedules to the affidavit were not signed.

Mr. *Crickmore*, contra, contended that the practice here should be equally liberal with that in England: there an affidavit sworn in a colony before a person lawfully authorized to take affidavits in that colony, can be read without any certificate of that person being so authorized (*a*).

Judgment.

The Secretary.—It is unnecessary to consider all the objections to the plaintiff's affidavit on production, as the first is fatal to it. The affidavit is sworn before a person who had no authority to administer the oath. The fact that the affidavit had been for several months on the files is no objection to the defendant moving. The affidavit is not irregular—it is void; and no act of the defendant could have the effect of waiving the objection. Though it is not necessary to consider the

(*a*) Smith Pr. 664.

1870.

McEwan v. Boulton.

various objections, I may remark that in strictness the schedule of papers produced should be signed by the commissioner before whom the affidavit is sworn, and it is desirable that in all cases it should be so.

I do not give any effect to the objection taken by the plaintiff, that the defendant's notice of motion is not properly styled in the cause. It appears that before the notice was given the bill had been amended by adding parties; but it does not appear that the defendant's office-copy of the bill had been amended, or that he had any notice of the change in the style of the cause.

The proper order to make will be that the plaintiff do file a proper affidavit on production, and pay the costs of this motion.

MERCHANTS BANK v. GRANT.

Amending decree—Consent.

A consent decree may be amended on petition, if it is shewn that it contains terms which were not consented to.

[March 13, 1870.]

Mr. *T. Moss* moved on petition to amend the decree in this cause.

Mr. *J. Hoskin*, for the defendant, urged that the decree had been made by consent, and that a consent decree could not be amended or varied, and asked that the petition be dismissed with costs.

Mr. *Moss*, in reply, said that the decree was in one sense only a consent one, it was consented that a decree for foreclosure should be made, but the terms of it were not part of the consent.

Order granted.

1870.

BLACKBURN v. MCKINLAY.

Next friend.

Where a married woman is a co-plaintiff with her husband who has a substantial interest in the suit it is nevertheless necessary that the wife should sue by next friend.

[Court, April 4, 1870.]

The plaintiffs, man and wife, had filed a bill as co-plaintffs to enforce specific performance of a contract to purchase certain real estate which they owned as tenants in common.

The defendant demurred to the plaintiff's bill on the ground that no next friend to the married woman had been named.

Mr. *S. H. Blake*, in support of the demurrer, cited *Jessup* v. *McLean* (*a*); and contended that in the absence of a next friend the bill in its present shape was in effect the bill of the husband. Statement.

Mr. *Cooper*, contra, contended that when the husband was a co-plaintiff with a substantial interest in the subject matter of the suit no next friend was necessary. The next friend was appointed as security to answer the costs of the defendant, not as a protection against the husband. That the husband would be *dominus litis* was no objection; the husband might in certain cases be the next friend of the wife, where she was solely interested, and he would then be *dominus litis*, and here where he was half owner of the property there was nothing objectionable in his being so. The true criterion was, could the plaintiff here be called on to appoint a solvent next friend, or give security for costs, if not, the appointment of a nominal next friend, who might be a man of straw, was a

(*a*) 15 Grant 489.

1870.

Blackburn v. McKinlay.

practice the Court would not encourage. The plaintiff could not be called on for security for costs. He cited on this point *Dowden* v. *Hook* (*a*), *Fellows* v. *Barrett* (*b*), *Jones* v. *Fawcett* (*c*) *Re Lancaster* (*d*), *Smith* v. *Etches* (*e*), the only contra decision was *Rann* v. *Lawless*, (*f*); which was not acquiesced in by the profession as establishing the practice, and had been followed, but from his language, evidently reluctantly by the Secretary in *Van Vinkle* v. *Chaplin* (*g*).

STRONG, V.C.—I allow the demurrer, with costs.

MCILROY V. HAWKE.

Time for moving against an order.

Motion before a Judge to set aside an order to revive was held to be too late after the lapse of fourteen days.

But under the circumstances the Court granted an enlargement of the time.

[Court, April 12, 1870.]

Mr. *Holmested* moved to set aside an order to revive.

Mr. *Bain* took the preliminary objection that the motion was not made in time, inasmuch as it should have been made within fourteen days after the date of the order, and cited *Harris* v. *Meyers* (*h*), and *Jackson* v. *Gardiner* (*i*).

STRONG, V. C., before whom the motion was made, allowed the objection.

(*a*) 8 Beav. 399.
(*b*) 1 Keen 119.
(*c*) 2 Ph. 278.
(*d*) 2 W. R. 337.
(*e*) 1 H. & M. 711.
(*f*) 1 Cham. R. 333.
(*g*) 4 Cham. R. 98.
(*h*) 16 Grant, 117.
(*i*) 2 Chan. Cham. R. 385.

Mr. *Holmested* then asked that the time for moving might be enlarged under the circumstances. 1870. McIlroy v. Hawke.

Mr. *Bain* urged that the application for enlargement should be made in Chambers, and asked for costs of the day.

THE VICE CHANCELLOR granted the enlargement of the time, reserving the question of costs.

CLARK V. CLARK.

Bringing in accounts—Discharge from custody.

When a party has been committed for not bringing in accounts, and it is shewn by certificate that the accounts have since been brought in, it cannot be urged on a motion for his discharge that the accounts are insufficient.

Nor will the payment of costs be made a condition precedent to his discharge.

[Chambers, April 26, 1870.]

Mr. *J. A. Boyd*, moved for the discharge of the defendant from custody, he having been committed for non-production of his accounts, the certificate of the Master shewed that the accounts were now filed; in such a case, it was contended the Court would not look at the sufficiency of the accounts, nor would the payment of costs be made a condition precedent: *Pherill* v. *Pherill* (*a*).

THE SECRETARY made the order for the defendant's discharge, without reference to the costs.

(*a*) 2 Cham. R. 444.

1870.

FELAN v. MCGILL.

Insolvency—Receiver—Jurisdiction.

This Court has jurisdiction, and will exercise it, to prevent a creditor of one partner obtaining an undue preference over the creditors of a firm by means of proceedings in this Court. Where, therefore, a purchaser at Sheriff's sale of the interest of one partner filed his bill for an account and a receiver, and the receiver obtained possession of the stock-in-trade; leave was granted to a creditor of the firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency when he should be appointed.

[Chambers, May, 1870.]

Statement.

The defendants *Robertson & McGill* were merchants carrying on business at Oakville. One *Williams* obtained judgment against *Robertson*, one of the partners, and issued execution, and the interest of *Robertson* was sold at sheriff's sale to the plaintiff. The plaintiff filed a bill for an account and reference, and a receiver was appointed in whose hands the stock-in-trade was placed; an application was now made in Chambers on petition, on behalf of *Thorne, Parsons & Vennor; W. R. Griffith;* and *C. Bunting*, creditors, for leave to take proceedings in insolvency against the firm, and for an order that the receiver hand over the stock-in-trade to the official assignee.

Mr. *Thorne*, for the creditors, urged that the defendants were insolvent; that the suit by *Phelan*, the plaintiff, was for his benefit alone, and the creditors were excluded; that *Thorne & Co.*, had obtained judgment, and unless the present application was granted they would obtain priority; also, that the estate could be better wound up in insolvency, and at less expense than by a suit in this Court. He referred to *Kerr* on Receivers, and the principles laid down there as establishing the practice.

1870.

Felan v. McGill.

Mr. *C. Moss*, contra, contended that for aught that was shewn the estate was solvent; that the assets were now in the hands of the receiver; that the Court had jurisdiction over the receiver, and that it was the practice in such cases to let him continue in power, and not transfer the powers of this Court to another, and send the plaintiff to prove in insolvency. Defendants were shewn not to have committed any act of insolvency.

Mr. *J. Hoskin*, appeared for the defendants. *Taylor* v. *Lewis* (*a*), was referred to.

STRONG, V. C., before whom this motion came on, granted leave to the petitioners to take any proceedings in insolvency they might be advised, but declined to make any order for the delivery over of the stock until an assignee in bankruptcy should be appointed. On such assignee being appointed, another application might be made, the receiver not to part with any of the property in the meantime, and the assignee in bankruptcy, when appointed, undertaking that if the estate should be found sufficient to pay the creditors of the firm; the balance, if any, should be returned to the receiver.

Judgment.

MONTGOMERY V. SHORTIS.

Judgment—Sale under—Priority.

Where a party purchased lands at sheriff's sale under a judgment which had been registered before the registry of certain mortgages on the lands, although the mortgages had been made before, it was held that the purchaser took priority and an estate in fee.

[Chambers, June, 1870.]

This was a notice to set aside an order made in Chambers making *McKay* a party to a foreclosure suit as part owner of the equity of redemption.

(*a*) 14 U. C. Q. B. 128.

1870.

Montgomery v. Shortiss.

McKay had purchased a part of the mortgaged premises at sheriff's sale. They had before then been mortgaged to *Montgomery*, and the mortgage was registered at the time of the sale, and at the time of the placing of the suit in the sheriff's hands.

The judgment, however, under which the sale took place had been registered before the registration, although after the making of the mortgages.

Mr. *Cattanach*, in support of the motion, cited *Freeman* v. *Bank of Upper Canada* (*a*), *Bank of Montreal* v. *Thompson* (*b*), *McMaster* v. *Phipps* (*c*).

Mr. *John Bain*, contra, cited *Thirkell* v. *Paterson* (*d*), *Bethune* v. *Calcutt* (*b*), *Wales* v, *Bullock* (*c*), *Carr* v. *Anderson* (*d*).

Judgment.

STRONG, V.C.—Held *McKay* took an absolute estate free from *Montgomery's* mortgage. Order set aside with costs.

COLLINS V. ORME.

Administrator—Payment into Court.

Where an administrator by his accounts admitted in his hands $112, the Court refused a motion for payment of that amount into Court pending the reference.

[Chambers, June, 1870.]

This was an administration suit, the administrator by his accounts brought into the Master's office admitted there was a balance of $112 in his hands belonging to

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(*a*) 2 E. & A. 362.
(*b*) 3 E. & A. 239.
(*c*) 5 Grant 258.
(*d*) 18 U. C. Q. B. 75.
(*e*) 1 Grant 81.
(*f*) 18 U. C. C. P. 155.
(*g*) E. & A.

the estate. There was no allegation of danger to the fund.

1870.

Collins v. Orme.

Mr. *Fitzgerald*, for plaintiff, moved that defendant should pay the balance into Court.

Mr. *Boyd*, contra, contended that the administrator was entitled to retain a reasonable sum to meet his costs until the question of costs should be disposed of on further directions, and that the sum was so small that the motion should be refused without the administrator being put to the expense of an affidavit shewing the amount of costs incurred. There was no suggestion of misconduct on the part of the administrator which was likely to deprive him of his costs. He cited *Re Babcock* (*a*).

MOWAT, V. C., refused the motion with costs.

BROWNSCOMB v. TULLY.
RE FAIRBAIRN.

Solicitor's lien—Compromise of suit.

Under what circumstances lien held not to exist.

[Chambers, June, 1870.]

This was in effect a suit for foreclosure in which the usual decree of reference had been made.

The plaintiff and defendant, without the knowledge of the defendant's solicitor, entered into a compromise by which defendants gave a release of their equity of redemption for the sum of $200, which was then paid by the plaintiff to the defendants.

(*a*) 8 Grant 409.

1870.

Brownscomb v. Tully.

Mr. *Fairbairn*, the defendants' solicitor, filed a petition in the suit, claiming to be entitled to a lien on the $200, and praying that the plaintiff and defendants should be ordered to pay the same to him for his costs, which had been taxed and were unpaid.

Mr. *J. A. Boyd*, for the petitioner, cited *White* v. *Pearce* (*a*), *Hanson* v. *Reece* (*b*), *Bank of Montreal* v. *Wilson* (*c*).

Mr. *Cattanach*, contra, cited *Brunsdon* v. *Allard* (*d*), *Anonymous case* (*e*), Morgan & Davey, 396.

STRONG, V. C.—Held that there was no fund recovered by the solicitor, and that no lien had ever existed. Petition dismissed with costs.

RE HILLIKER.

Quieting Titles Act—Separate estate of wife—Married Woman's Act.

A devise by a married woman of property which was her separate estate, but of which her husband has been in possession before 4th May, 1839, was held to be good.

[June 7, 1870.]

This was a petition by *Daniel Hilliker* and *Lerna* his wife under the Act for Quieting Titles.

The plaintiffs claimed in right of *Lerna* as sole heiress-at-law of *Eliza Jane Sharp*, deceased, who was the wife of *David Sharp*, and who having no child, devised the property in question to her husband. The contestants claimed under the will; and the petitioners

(*a*) 7 Ha. 276.
(*b*) 3 Jur. N. S. 1204.
(*c*) R. C. Cham. 117.
(*d*) 5 Jur. N. S. 596.
(*e*) 2 Ves. 55.

insisted that the husband was in possession of the property on and before the 4th May, 1859; that property in that position was not made "separate property" by the Married Woman's Act (*a*); and that the 16th section, which gives the power of devising "separate estate" did not apply to such a case. The contestants disputed these points; and one of them set up a title under the Registry Acts.

Mr. *Leith*, for the petitioners.

Mr. *Foster*, for the contestants.

MOWAT, V.C.—As my opinion is against the petitioners on the construction of the 16th section, it is not necessary to consider the other points which were argued.

Judgment.

It was suggested that the 16th section might be construed as confined to property given independently of the Act to the separate use of a married woman. But looking at the whole scope of the Act, and remarking that without the Act a married woman had larger powers of devising separate property which came to her as owner by deed or devise than the Act gives (*b*), I am clear that the 16th section cannot be construed as referring to separate property of that kind.

It seems quite true that the second or any other section of the Act did not make this sort of interest "separate estate," in the sense in which Courts of Equity have been in the habit of using that expression, insomuch as the Act did not give a wife, married on or before 4th May, 1859, any control over property then taken possession of by her husband by himself or his tenants; but did the Legislature use the expression in its

(*a*) See Consol. Stat. U. C. ch. 73, sec. 2.
(*b*) Taylor v. Meads, 11 Jur. N. S. 167.

1870. strictly technical sense? A design to exclude from the devising power property in that position would be curious; and no possible object for it, consistent with the purpose of the Act, was suggested.

Re Hilliker.

The third section provides that executions for a wife's torts "shall first be levied on her separate property;" and the 18th section provides that claims in respect of contracts made or debts incurred by her before her marriage shall be recovered out "of her separate estate only." It is not to be supposed, that the expression "separate property, and separate estate" in those clauses were not intended to include property of which the husband had got possession at the date named. On the contrary, I am of opinion that in these two clauses and in the 16th also, the Legislature did not use the expression in the strict technical sense of a Court of Equity; and meant by it no more than if the expression had been "her property," or the like.

Judgment.

My judgment therefore is for the contestants; and the petition will be dismissed with costs.

FISKEN v. SMITH.

Costs of appearing to urge an irregularity.

A party appearing to ask costs on a notice irregularly served does not thereby waive the irregularity.

[June 7, 1870.]

Mr. *Snelling*, moved on notice to commit three defendants for not bringing in accounts in the Master's office.

Mr. *J. A. Boyd*, objected that the notice of motion was not sufficient, Sunday not counting as one of the four days which must intervene between the service of

notice and a motion to commit; and claimed costs in accordance with a recent decision of *Strong*, V.C., (*a*) that a party appearing to ask costs of an irregular notice did not waive the irregularity. 1870. Flaken v. Smith.

Motion refused with costs.

CLEMENTS v. ARNOLD.

Infants—Costs—Duty of Local Masters as to appointing guardians.

When on a plaintiff's motion for appointing a guardian to an infant defendant, the person appointed is nominated by or at the instance of the infant; he is not entitled as of course to his costs against the plaintiff.

On such a motion the Master should not appoint the plaintiff's nominee, but should select one of the practitioners in the County Town, the one who seems best fitted on the whole for the duty, and appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants and if no special reason exists for naming in preference some other solicitor.

[Court, June 7, 1870.]

This was a case heard at London.

Mr. *Glass*, for the plaintiff.

Mr. *Blake*, Q.C., for the defendant.

At the close of the argument the Court dismissed the bill, reserving the question of costs, as to which *Mowat* V.C., afterwards delivered the following judgment:

MOWAT, V.C.—When this case was argued I expressed my opinion that the bill must be dismissed, and I reserved for consideration the question of costs only. I think the dismissal should be without costs as to the Judgment.

(*a*) Robertson v. Grant, reported in this volume.

1870.

Clements v. Arnold.

adult defendants, and with costs as to the infant defendants. I give the infant defendants their costs, because the principal reasons which lead me to withhold the costs from the other defendants do not apply to the infants; and, to prevent misapprehension, I think it right to add, that I do not concur in the suggestion made on the part of the infants, that a guardian appointed on the plaintiff's application under the Consolidated Order No. — is always entitled to his costs against the plaintiff, even though such guardian may be the nominee of the infant and his friends.

In England, when a guardian is not named by, or at the instance of, the infant, the solicitor for the Suitors' Fee Fund is generally appointed guardian by the Court, and his costs must be paid by the plaintiff (*a*), but the rule does not necessarily apply to a guardian selected by the infant. There is certainly no more reason why a guardian so selected should, as of course, get his costs against the plaintiff when appointed on the plaintiff's motion, than if selected and appointed without putting the plaintiff to move.

Judgment.

Some of the local Masters, I understand, have, on such applications, been in the habit of appointing as guardian the nominee of the plaintiff. That is a mistake. The duty of the solicitor appointed is, to see that the plaintiff shall not get a decree or other advantage to which he is not entitled; and to appoint the plaintiff's nominee to do this duty reduces the appointment to a mere matter of form, and makes it a useless expense to the estate. It would be convenient if every local Master (following the practice of the Court in Toronto) would select one of the practitioners in the county town, the one who seems best fitted on the whole for the duty, and

(*a*) See Morgan's Orders, 4th ed. p. 577.

appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants, and if no special reason exists for naming in preference some other solicitor.

1870.

Clements v. Arnold.

Re Ashford.

Quieting Titles Act—Certificate granted ex parte on a false affidavit.

A certificate granted *ex parte* on a false affidavit was set aside with costs, nowithstanding the contention that the notices as to the service of which the false allegation was made would not have been directed had the full facts been before the Court; the Court declining to enter into any question of merits.

[June 8, 1870.]

This was a petition to set aside a certificate of title granted under the Act for Quieting Titles. The applicant for the certificate had been directed to mail certain notices to persons resident in Kansas and California. Affidavits were afterwards filed proving the due mailing of the notices as directed: and on the expiration of the time in which the parties served were directed to appear, such time being reckoned from the day of mailing, no application being made, the certificate of title was issued. The present petition was by one of the persons referred to; it claimed an interest in the lot in question, and alleged, that the day of mailing had been falsely stated in the affidavit filed; that the notice had not in fact been mailed until the month after that named in the affidavit. The petition to set aside the certificate was filed within the time in which the contestant was entitled to appear, according to the time of mailing.

Statement.

Mr. *S. H. Blake*, for the petitioner.

Mr. *Smart*, contra, proposed to argue that if the Court had been aware of the facts now appearing on

1870. depositions taken since the certificate had issued, and which had lately come to the knowledge of the petititoner, he would not have been directed to serve the notices referred to.

Re Ashford.

The Court declined to entertain that question, holding, per *Mowat*, V.C., independently of the merits, that the Court having been misled by the false affidavit, the certificate of title which was granted *ex parte* must be set aside with costs, and the matter referred back to the referee.

Little v. Hawkins.

Costs.

Where after notice of motion to stay proceedings until the costs of a former suit for the same cause of action should be paid, such costs are paid, the costs of the motion to stay proceedings will be made costs in the cause.

[June 17, 1870.]

Mr. *Holmested* moved to stay proceedings until the costs of a former action for the same subject matter were paid. Since the notice had been given the costs had been paid. He therefore asked the costs only of the present application.

Mr. *C. Moss*, contra, contended that such should be costs in the cause.

The Secretary said that that was the rule laid down by Vice Chancellor *Strong*, and he should follow it.

KLINE v. KLINE. 1870.

Motion to set aside a decree pro confesso.

A motion to set aside a decree obtained by default, and not on the merits, was held to be properly made in Chambers.

[Court, June 18, 1870.]

In this matter the motion had been set down to be heard before the Court, the Secretary considered that it should properly be made in Court as involving the setting aside a decree of the Court.

SPRAGGE, C., however, held that it was a matter which could more properly be heard and disposed of in Chambers, the setting aside of the decree being a difficulty more technical than otherwise, the decree not having been made on the merits but only in consequence of default, and directed that such motions should in future be heard before the Secretary, remarking that that was the course when the Judges themselves took Chambers and would be the most convenient course now. Judgment.

Mr. C. Moss, for the applicant the defendant.

Mr. J. Bain, for the plaintiff.

RE BACON.

Costs—Taxation.

Where on an application by a solicitor for a taxation of his bill of costs the client disputed the retainer as to the whole bill and also set up the Statute of Frauds, it was held that the Court had jurisdiction to refer these defences to the Master.

An order of course for the taxation of costs is not to be discharged for the omission therefrom of any reference to defences of which the petitioners had no previous intimation.

[June 22, 1870.]

In this case an order of course was obtained by the executors of a solicitor for the taxation of a bill of costs.

1870.

Re Bacon.

The party charged moved to discharge or vary this order on two grounds; (1) that the retainer was disputed as to the whole bill, and (2) that the claim was barred by the Statute of Limitations. He contended that, the liability being disputed, it must be determined by an action at law, before the executors are entitled to an order.

Mr. *Scott*, for the application.

Mr. *Harris*, contra.

MOWAT, V. C.—I do not find any authority for holding the practice in Chancery to be as contended (*a*). The question of retainer is constantly referred to the Masters of this Court; and it would be anomalous if the Court had to refer to another tribunal the decision of any facts on which the jurisdiction given to the Court by a statute (*b*) depends. I think that the Court has a discretion in each case to decide how the disputed facts shall be determined; and I think that it will be proper in the present case to refer them to the Master.

Judgment.

It was contended, that the order was irregular by reason of these defences not having been mentioned in the petition; but, as no intimation of them appears to have been given before the order was taken, and as it does not appear that the petitioners had any reason to suspect that any question as to the retainer or the Statute of Limitations existed, I do not see how I can say that the omission to state them was such an irregularity as should avoid the order, if the order is maintainable on the merits.

I shall direct, therefore, that the party is to be at liberty before the Master to dispute the retainer by him

(*a*) Re Bracey, 8 Beav. 268; Re Thurgood, 19 Beav. 541.
(*b*) See Attorneys' Act, 1864, ch. 35, sec. 29.

of Mr. *Bacon*, as his solicitor; and to set up the Statute of Limitations. The costs will be reserved until after report. 1870. Re Bacon.

DUDLEY V. BERCZY.

Purchaser—Compensation—Delay.

Where on a reference granted at the instance of a purchaser under a decree, the Master had found him entitled to a less sum by way of compensation for delay, &c. than the evidence appeared at a subsequent stage of the proceedings to have warranted, and he applied for further relief after an interval of eleven months, the Court refused the application on the ground of delay.

[June 22, 1870.]

Statement

Mr. *John Strathy* was the purchaser of certain real estate sold under the decree in this cause on the 8th May, 1868, for $3980. One of the conditions of sale was, that the purchaser should pay one-tenth of his purchase money at the time of the sale, and the remainder with interest in one month from the day of sale; and upon such payment the purchaser was declared to be entitled to a conveyance and possession. Mr. *Strathy* paid in his purchase money accordingly, but the vendor was not prepared to shew a good title then, and did not do so until the 19th October, 1868. On the 9th February, 1869, the purchaser obtained an order in Chambers for the costs of the reference as to title; for possession; for an inquiry as to rents, deterioration and damage; and for payment of the amount thereof. The purchaser had not at this time got possession of the premises, and did not do so until 11th March following, when he obtained it by means of a writ of assistance. The order of the 9th February was appealed from by the vendor; and on the 7th April, 1869, *Mowat*, V. C., pronounced judgment on the appeal, holding, that the delay in furnishing the abstract, and afterwards in

1870. Dudley v. Percay.

making out the title, had not been explained satisfactorily; but that the order as drawn up went further in favor of the purchaser than the authorities warranted; and variations were made in the order for the purpose of making it conformable to what was held to be the practice of the Court (*a*).

On the 19th June, 1869, the Master made his report, finding, that the amount which the plaintiff had received, or but for his wilful default might have received, was $37.85, over and above taxes which he had paid; and that the plaintiff was not chargeable with or accountable for any deterioration or damage. On the 6th April the purchaser obtained in Chambers an order for the costs of the reference: and on the same day an order in Chambers was made refusing an application made by the plaintiff and another party, on notice, for an order that the purchaser should pay the costs of the reference. These two orders were appealed from; and the appeals were argued on the 13th May.

After the appeals had been argued the purchaser gave notice of an application that, instead of the $37.85, he should be paid an amount for compensation to be fixed by the Court, or should be paid the interest on his purchase money from the time of paying it in until he got possession of the property. This motion was argued on the 27th May.

Mr. *Snelling*, for the purchaser.

Mr. *Ferguson*, contra.

Judgment.

MOWAT, V. C.—I shall dispose of the purchaser's application first. It appears that he was offered, and probably might have obtained, $600 a year for the pro-

(*a*) 2 Chamb. R. at 369.

1870.

Dudley v. Perczy.

perty for the time which elapsed between the paying in of his money, and getting possession. I think that the vendor did not shew that degree of diligence which was incumbent on him in making out his title, or in enabling himself to give the purchaser possession as soon as the title was established; and if the purchaser's present application had not been embarrassed by the proceedings which he had previously taken for compensation, I am not prepared to say that the evidence now before me would not have shewn the purchaser to be entitled in some form to a larger compensation than the sum named by the Master (a). But—the purchaser having taken the order of the 7th February; having acquiesced in the variations made upon the appeal from that order; having acquiesced in the Master's report from the 19th June, 1869, to the 17th May, 1870; and having applied for and obtained an order on the 6th April carrying out that report—I think that it is too late to raise before me the questions argued on his present motion, and that I must refuse the motion with costs.

Judgment.

As to the plaintiffs' appeals, I think that, in disposing of the costs, it was competent and proper to consider all the circumstances; that granting to the purchaser the costs of the reference was a just exercise of discretion; and that the plaintiffs' appeals must be dismissed with costs.

(a) See Fisken v. Wride, 11 Grant, 249; Thomas v. Buxton, L. R. 8 Eq. 120; Biggar v. Dickson, 2 Chamb. R. 196.

1870.

McFeeters v. Dixon.

Dismissing bill—Parties—Churchwardens.

A bill was filed by churchwardens, and during the progress of the suit the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought to a hearing within the time required by the practice: it was held that a notice to dismiss the bill served on the plaintiffs' solicitor was regular.

Quærey, whether it was necessary to make the new churchwardens parties.

On a motion to dismiss it appeared that the case had not been brought to a hearing through an error in judgment of the plaintiffs' solicitor, held that it was proper to take into account such error in considering the application in connection with the other circumstances of the case.

[June 27, 1870.]

Statement.

This was a suit against *Anthony Dickson* and *James O. L. Gibson*, churchwardens of St. John's Church in the Rectory of Darlington, claiming to be indemnified by the defendants as churchwardens in respect of certain liabilities assumed for the benefit of the church which they represented, and at the instance of the vestry thereof. One of the churchwardens answered, disputing the liability; the other allowed the bill to be noted *pro confesso* against him. The answer having been replied to, the cause was set down by the plaintiffs to be heard at the last Toronto Sittings, which were held in March; but the hearing was postponed on the application of the defendants (in consequence of the illness of a witness) to the Cobourg Sittings, which had been appointed for the 6th June. At the Easter vestry meeting (April 18th), two new churchwardens were appointed. Afterwards, viz., on the 19th May, in pursuance of an order previously obtained, the plaintiffs examined *de bene esse* one of their witnesses, who was about to proceed to the Red River territory. The 21st May was the last day for serving notice of hearing for the Cobourg Sittings; and "on or about" that day the

solicitor who had the management of the suit for the plaintiffs received a letter from one of the plaintiffs which led the solicitor "to inquire whether or not the plaintiffs' suit had become defective, by reason of there having been a change of churchwardens at the last Easter vestry meeting of the said church." This was the language of the solicitor's affidavit; and it was thought doubtful whether his meaning was, that he then for the first time became aware of the change; or whether, though aware of the change before, he then for the first time was led to inquire whether it rendered the suit defective. "On consultation with counsel it was deemed unsafe for the plaintiffs to go down to a hearing while the suit was constituted as at present; and, acting under the advice of counsel," the solicitor did not set the cause down for the June Sittings, as he had intended. Some days afterwards, he mentioned the difficulty to Mr. *Downey*, whose firm were agents for the defendants' solicitor. Mr. *Downey* appeared to have immediately communicated with the new churchwardens; and, having got their authority, he wrote the plaintiffs' solicitors on the 1st June, informing them that, if they thought the change of churchwardens a difficulty, his firm had instructions from the new churchwardens to appear for them; to consent to their being added to the suit either along with or instead of the present defendants, and to go down to a hearing at the approaching Cobourg Sittings; and they offered to consent to any order which might be found necessary to accomplish this object. They further stated that their clients were anxious to have the case disposed of at once; that they could not consent to any delay; and that, unless their proposal was accepted that afternoon, they would serve a notice to dismiss. The plaintiffs' solicitor "felt it impossible in the interests of the plaintiffs to bring the cause down on such short notice," and he replied accordingly. The defendants thereupon served notice to dismiss, returnable on the 4th June; and the application being made in Chambers on that

Statement.

1870. day was refused. The answering defendant moved to discharge this order, and his motion was argued before Vice Chancellor *Mowat* on the 20th June.

McFeeters v. Dixon.

Mr. *McLennan*, for the appeal.

Mr. *C. Moss*, contra.

MOWAT, V.C.—For the plaintiffs it is objected that a notice to dismiss was not the proper course; that the defendant should have moved to revive within a given time, or in default for dismissal. But I think that the notice to dismiss was regular. The other course is taken where the motion is by the representatives of a deceased defendant, who are not themselves parties to the suit; but the defendants' position has no analogy to that. It resembles that of a defendant becoming bankrupt; and the practice in such cases is for the plaintiff to move to dismiss; though on the motion the Court may give time to enable the plaintiff to bring the assignees before the Court (*a*).

Judgment.

Then as to the merits: Having now read the papers, and heard in person the arguments of counsel, I am of opinion that the order was wrong. The delay from the 19th April, when the new churchwardens were appointed, to the 21st May, when the plaintiffs' solicitor first thought of the possible effect of the change, is not, as the order assumes, so justified by the affidavit filed as to put the defendants in the wrong in moving to dismiss. The annual choosing of churchwardens on Monday in Easter week is provided by the statute under which the plaintiffs were suing, and is well known; and the utmost that I can understand to be said on the part of the plaintiffs is, that its possible consequence as making the suit defective had not occurred to their solicitor until on or

(*a*) Williams v. Page, 24 Beav. 490.

about the 21st May. Notwitstanding the change, however, the defendants were permitting their case to go on without objection, the examination of the witness *de bene esse* having taken place subsequently; and it is not certain that there was any necessity for taking notice of the change. *Marriott* v. *Tarpley* (*a*) was cited to me as shewing that in the case of a suit by churchwardens, a supplemental bill was necessary on a change of churchwardens. But that reading of the case is a mistake. The supplemental bill there was for the purpose of stating certain proceedings which had taken place at law after the filing of the bill; and the learned Vice Chancellor, by whom the case was decided, held expressly that a suit commenced by churchwardens during their year of office could be continued afterwards in their own names. The same thing had been previously held at law (*b*). If that is the rule where churchwardens are plaintiffs, it would seem to follow that where they are defendants the rule should be the same. But "the case of a succession to a bishopric or benefice" is one of the cases in which it is stated in the text books upon the old practice, that the benefit of the suit against the person becoming entitled must be obtained by an original bill in the nature of a supplemental bill (*c*). Such bills being now abolished (*d*), an order to revive may be a proper proceeding on the part of the plaintiff.

Judgment.

But I think that extraordinary diligence was incumbent on the plaintiffs' solicitor when he found that he had inadvertently allowed so much time to be lost, and that the alternative was, throwing the case over till the Autumn Sittings. I think that, in view of these circumstances, and of the purely technical character of the supposed difficulty, an immediate application to the

(*a*) 9 Sim. 279. (*b*) Dent v. Pardence, 2 Str. 852.
(*c*) See Story Eq. Pl. sec. 350; and references.
(*d*) Consol. Ord. No. 6.

1870. defendants' solicitors to concur in some proceeding to meet the newly-thought-of difficulty would not have been an unnatural course on his part, before abandoning his intention to hear the cause at the Spring Sittings; and there seems no reason to doubt that such an application would have been acceded to, with no other delay than was necessary to write to Bowmanville and to receive an answer. On receiving from the defendants' solicitors their letter of the 1st June, proposing to consent to any order that might be supposed necessary, I do not think that the plaintiffs' solicitor should have decided without inquiry that he could not then safely go to a hearing at the Cobourg Sittings, which were to commence on the 6th.

McPheeters v. Dixon.

Still an error in judgment in regard to such matters is not necessarily fatal. That must be determined in view of all the circumstances; and, as I am satisfied that the plaintiffs' solicitor acted in good faith throughout; as one of the churchwardens allowed the bill to be noted *pro confesso* against him; as the plaintiffs have had no interlocutory relief by way of injunction; as the suit does not tie up any property which the defendants may desire or have occasion to sell and does not throw a cloud on any such property; as, but for the postponement to Cobourg at the defendants' instance, the case would have been heard in Toronto in March, and long before the change which has caused the supposed difficulty, I think that on the plaintiffs, or one of them, making and filing by Wednesday morning an affidavit shewing that the plaintiffs purpose proceeding to a hearing in the Autumn, and that the application to dismiss is not resisted for the mere sake of delay—the bill may be retained, the plaintiffs paying the costs of the application, not including the costs of the argument in appeal. Otherwise I dismiss the bill with costs.

Judgment.

1870.

HARRIS v. MEYERS.

Sequestration—Powers of sequestrators as to making a lease.

Held, that sequestrators can lease for any period during which the rents would be less in the aggregate than the amount for which sequestration issued.

[August 25, '1870.]

This was an appeal from the Secretary's decision.

Mr. *Bain*, for the appellants, the defendants in the cause.

A sequestration had issued in the cause, and the sequestrators had entered into an agreement to lease the premises, consisting of certain mill property, to a tenant for three years; and the agreement was sanctioned by the Court. The agreement contained a clause which was now objected to, that if the sequestration should be discharged before the end of the three years, the lease should terminate on six months' notice being given, payment to be made for the improvements to be settled by the Master. Statement.

Mr. *Bain*, contended that the lease created an encumbrance continuing beyond the running of the writ, and which would not expire when the writ was discharged—no provision is made in the agreement for compensation. There should have been an inquiry directed as to whether the lease was for the benefit of the infant defendants. They were creating an encumbrance on the estate of infants, and improving them out of their property. The lease should be co-extensive with the interest of the sequestrators, and that only. Mr. *Bain* referred to a case in 3 Maddock's Reports.

Mr. *Spencer*, contra. In the case in *Maddock*, the suit was by a creditor of the tenant for life.

1870.

Harris v. Meyers.

V. C. MOWAT (before whom the case was heard) to Mr. *Bain*.—Your argument would make the tenant only a tenant-at-will, which is going a long way.

Mr. *Spencer*, continuing. It appears by affidavit that the property would be useless without an outlay made on it for the purpose of building a dam, and a term must be created to render the property available under the sequestration. The sequestrators here have the sanction of the Court. The case in *Maddock* is not applicable. The provision objected to is a reasonable one, and is necessary to render the property productive of anything, and it is competent to the Court to make such a term. There is a clause in the agreement that the Court may introduce any term it may deem proper.

MOWAT, V. C.—I am inclined to hold that the sequestrators can lease for any period during which the rent would be less in the aggregate than the amount of the debt for which sequestration issued.

Judgment.

Upon this expression of opinion the appeal was allowed to drop.

RE SOLICITORS.

Taxation of costs.

An order will not be granted for a taxation of costs before a Master in an outer county even on a consent.

[September, 1870.]

Mr. *Chadwick* applied on petition on behalf of the solicitors for the taxation of certain bills of costs.

The solicitor for the client consented to the taxation being held at Hamilton.

THE SECRETARY said, that under the present practice, he could not order a taxation at Hamilton.

Order made for taxation at Toronto.

1870.

BUTLER v. CHURCH.

Leave to appeal.

Where a defendant intended to appeal from a decision within the year allowed for the purpose; but deferred appealing at once in order to ascertain the result of a reference: and the time for giving notice was allowed to pass by a mistake of his solicitor, who resided in Ottawa, and erroneously supposed that he had a year to give the notice; the Court gave leave on special terms to appeal for the following Court.

[September, 1870.]

This was a motion for leave to appeal from the decree (*a*), notwithstanding the lapse of the year within which an appeal may take place without leave. The decree was pronounced on the 24th July, 1869; and the last day for giving notice of appeal, so that the appeal could be heard within the year, was the 30th April, 1870.

The decree declared the plaintiff entitled to the specific performance of a certain contract for the purchase of land; and directed the Master to ascertain the amount due in respect of the purchase money. On 12th October, 1869, the Master made his report, finding a large amount to be due the defendants. The plaintiff appealed from this report, and the appeal was argued before Chancellor (then V.C.) *Spragge* in December, 1869; judgment was pronounceed early in April, following, referring the matter back to the Master. The Master took further evidence and made a new report on the 11th May, 1870, finding nothing to be due. An appeal from this report was pending, but had not yet been brought on for argument. Statement.

The defendant's solicitor made an affidavit, sworn to on the 28th June, in which he deposed that soon after the decree was pronounced the judgment was laid before

(*a*) 16 Gr. 206.

1870.

Butler v. Church.

counsel, who advised an appeal; that the appeal was not immediately brought in order to ascertain the result of the reference; that the defendant, who resided in Ottawa, was under the impression that the defendants had a year from the date of the decree to give notice of appeal therefrom; and that when he sent up the papers to his agent in Toronto for the purpose of appealing he was advised that the application was too late, as the law required the cause to be brought to a hearing within the year. It appeared that the letter of his agent was dated 16th June. The notice of motion for leave was served for the 23rd August, being the first motion day after vacation. The motion was argued on the 30th August.

Statement.

In answer to the motion the plaintiff made an affidavit stating, among other things, that on or about the 24th May, believing that he was the owner of the land, and that there could then be no rehearing of the cause, and no appeal from the decree, he had commenced building a new substantial house as a residence upon the land in question; and that he was proceeding therewith; that he had already expended $250 on this building; and had material on the ground ready to use thereon worth about $50. An affidavit in reply stated that the plaintiff had long before the 30th April commenced to lay down materials and make preparations for building this house.

Mr. *Hamilton*, for the application, cited *Bank of Upper Canada* v. *Wallace* (*a*), *Tyler* v. *Webb* (*b*).

Hon. *J. H. Cameron*, Q.C., and Mr. *Fitzgerald*, contra, urged that no grounds for appeal were stated or shewn; that defendant had acquiesced in the decree, and that it was no reason or excuse for delay that defendant

(*a*) 2 Cham. R. 69.

(*b*) 3 Cham. R. 33.

waited to get the Master's report, and when he found it to be unfavorable came to the Court seeking an indulgence: *Dennison* v. *Dennison* (*a*), *Coates* v. *McGlashan* (*b*), *Butler* v. *Renwick* (*c*) were cited. 1870. Butler v. Church.

Mr. *Hamilton*, in reply. The only acquiescence has been the payment of costs. The delay arose from the misapprehension of the solicitor who practised in Ottawa, that he had a year from the date of the decree in which to give notice, a not unnatural mistake, and one by which the client should not be prejudiced. He was willing to be put upon terms.

MOWAT, V.C.—The statute requires "special grounds" to be shewn to the satisfaction of the Court or Judge on an application for leave to appeal after the time specified; and the late Chancellor held in *Bank of Upper Canada* v. *Wallace* (*d*) that it was only "under very special cirumstances" that the Court should grant leave; and he observed: "'*Sit finis litium*' is a maxim which the Legislature properly recognized, and they have fixed a year as the period during which a judgment of the Court below might be considered as uncertain, should the unsuccessful party in that interval avail himself of the right to appeal, and they intended that at the end of the year, if no appeal were in the meantime had, the rights named or declared by the judgment might be possessed unquestioned. It is of the utmost importance that this should be borne in mind, that a man may know when he can safely deal with the subject or fruits of litigation." I concur entirely in the spirit of these observations; and would be sorry to give any decision that would conflict with it. It is difficult to determine what circumstances should be considered sufficiently special to justify an exception. It is impossible to hold Judgment.

(*a*) 2 C. R. 338.
(*b*) 1 C. R. 218.
(*c*) 1 C. R. 204.
(*d*) 2 Chan. Chamb. 170.

1870.

Butler v. Church.

that the desire of ascertaining the result of a reference directed by a decree is alone sufficient in every case to justify delay beyond the period fixed by the statute; though such a circumstance may be sufficient to account for not unnecesarily bringing on an appeal before the last Court which falls within the year. Until the report is made, it may not always be known whether there is any substantial reason for appealing; and in this case the account relates to transactions with a deceased person whom the defendants represent. It is not suggested that the defendant's solicitor has not used due diligence in prosecuting the reference. Then the mistake, which he says that he was under as to the time for appealing, is not questioned; and it was a very natural mistake on the part of a gentleman practising out of Toronto.

Judgment.

On the whole I think that the application may be granted, the defendant paying the costs of the application; and consequently in case of the appeal being successful, paying also the costs of, and incidental to, the reference, and reimbursing the plaintiff for his expense on the property since the 30th April, including what he may hereafter expend in finishing the house which he has commenced; and further consenting to abide by such order as the Court may make for setting off the sums so payable against any sums to which the defendants may become entitled against the plaintiff. The appeal must be brought on at the next sitting of the Court.

RE STEWART. 1870.

Insolvent Act—Costs.

Certain funds had come to the hands of an official assignee, but were payable to encumbrancers under claims arising before the insolvency; the judge in insolvency had ordered certain costs of the insolvent to be paid thereout. On appeal such order was reversed, the Court holding that the 11th section of the Insolvent Act of 1864 applies only to assets which belong to the insolvent beneficially.

[Court, September, 1870.]

This was an appeal from order made by a County Judge acting in insolvency.

The question was whether the costs of the insolvent were payable out of property which came to the hands of the assignee, but was payable to incumbrancers under claims arising before the insolvency; or whether the insolvent's right to payment was confined to assets distributable among the creditors under the insolvency.

The assignee had received certain surplus money which was decided in *Darling* v. *Wilson* (*a*) to belong to execution creditors who had writs in the sheriff's hands before, and at the time of the insolvency no question seemed to have been suggested as to the correctness of the decision in that case.

The whole of the money so received was required to pay the execution of the plaintiff in the suit, and another execution creditor who stood in the same position. The assignee had no other means of paying the costs in question.

Mr. *Edward Martin*, for the creditors who appealed.

No one appeared contra.

MOWAT, V.C.—I am of opinion, with great deference to the learned judge (whose judgment I have read) Judgment.

(*a*) 16 Gr. 255.

1870. Re Stewart. that the money in question was not subject to the insolvent's costs. The 16th clause of the 11th section of the Insolvent Act of 1864, on which the question depends, provides that "The costs of the action to compel compulsory liquidation shall be paid by privilege as a first charge upon the assets of the insolvent; and the costs of the judgment of confirmation of the discharge of the insolvent, or of the discharge if obtained direct from the Court, and the costs of winding up the estate, being first submitted at a meeting of creditors, and afterwards taxed by the judge, shall also be paid therefrom." The term "assets" in this enactment must be taken to mean assets which belonged to the insolvent beneficially, and which passed to the assignee for the benefit of the creditors whom he represented. The term does not embrace property of which he was a trustee, or was wrongfully in possession, or which belonged to others. Of encumbered property

Judgment. the equity of redemption or the surplus, is assets for this purpose; and not the property as if unencumbered. The costs referred to in the statute are costs with which prior incumbrancers have no concern, and which they cannot have been intended to pay. Thus it is impossible to suppose that the Legislature meant to give to the costs of the action to compel compulsory liquidation, and the costs of winding up the whole estate, a lien in priority to valid incumbrances; and the costs in question are not placed on a more favorable footing than these costs are. I think that the language of the enactment does not compel the stringent construction which the learned judge has put upon it; and that the nature of the case shews the Legislature did not so intend.

The order will be reversed. Counsel for the assignee asked for costs against the bankrupt property; but the practice does not warrant such an order as to costs. I refer to the cases collected in *Deacon's* Bankruptcy, 3rd ed. 1073.

1870.

LOWE v. CAMPBELL.

Order to amend..

An order to amend taken out pending a demurrer, without providing for the costs of the demurrer, was *held* to be irregular.

[September, 1870.]

Mr. *Bain*, on behalf of a defendant *Henry Stonehouse*, moved to set aside an order to amend which had been taken out on *præcipe*, whilst a demurrer to the plaintiff's bill was undisposed of, on the grounds that such order was irregular in that the order did not provide for the payment of the costs of demurrer, and such costs had not been tendered or paid. Such an order was not regular unless the plaintiff submitted to the demurrrer in which case the costs should have been paid. He also objected that the proposed amendments did not cover the grounds of demurrer: *Martin* v. *Reid* (*a*), *Warburton* v. *L. and R. R. Co.* (*b*), *Cartwright* v. *Smith* (*c*), *Hoflake* v. *Reynold* (*d*), *Baldwin* v. *Borst* (*e*), *Bainbrigge* v. *Moss* (*f*). Statement.

Mr. *J. A. Boyd*, contra, urged that the amendment did not effect the defendant *Stonehouse*, on whose behalf the present motion was made; that the amendment consisted merely in the striking out the name of a defendant who, it had been discovered, had no interest in the suit. The amendment did not affect the demurrer, the plaintiff could at any time before the demurrer was set down submit to the demurrer, and pay twenty shillings costs. The English cases referred to did not apply; here the failing to set down the demurrer is not a submission as it is in England, where the practice is different. The case of *Martin* v. *Reid* was of doubtful authority: the report is

(*a*) 6 U. C. L. J., June, 1860.
(*b*) 2 Beav. 253.
(*c*) 6 Beav. 121.
(*d*) 9 W. R. 898.
(*e*) 1 Cham. R. 82.
(*f*) 8 K. & J. 62.

1870. Lowe v. Campbell.

not in the authorized reports; it is very meagre; and it is not clear whether the statements are part of the judgment or remarks of the reporter or editor.

THE SECRETARY.—Any such order to amend pending a demurrer, without providing for the payment of costs, is irregular. Here the order is irregular; but another party having been served, if the plaintiff submits to pay twenty shillings costs, and the costs of the present motion, no order will be made; if not, then the motion will be granted with costs.

JAMESON v. JONES.

Examining de bene esse.

On applying for an order to examine a witness *de bene esse*, it should be clearly shewn that the witness is the only witness as to the fact sought to be proved by him. An application, supported by an affidavit of the solicitor as to his belief, was refused.

[September 15, 1870.]

Mr. *J. D. Edgar*, moved for an order to examine two witnesses *de bene esse*, on the ground that each was the only witness to a material fact.

Mr. *Downey*, contra, objected that the affidavits were insufficient in not stating positively that the witnesses were the only witnesses to the fact sought to be proved, the solicitor's affidavit spoke only to his belief without stating the grounds of belief: he cited *Hope* v. *Hope* (*a*), and *Rowe* v. *Blank* (*b*).

Mr. *Cattanach* appeared for another defendant.

Judgment. THE SECRETARY refused the motion with costs on account of the insufficiency of the affidavits.

(*a*) 8 Beav. 317. (*b*) 13 Ves. 261.

1870.

ARMOUR v. NOBLE.

Ex parte application—Costs.

Costs incurred on setting down a cause and afterwards countermanding notice of setting down were granted on an *ex parte* application.

[September, 17, 1870.]

Mr. *Bain*, for the plaintiff, applied for an order directing payment of costs incurred by the defendant setting down the cause, and afterwards countermanding the notice of setting down. The motion was made *ex parte*, Mr. *Bain* stating that at law such a motion is granted as of course.

THE SECRETARY.—The only question is whether the application should be on notice. I find that at common law, a rule for the costs is, under such circumstances as the present, drawn up on affidavit and without motion. Judgment.

Order granted.

GUTHRIE v. MACDONALD.

Dismissing bill—The pendency of another suit.

The pendency of another suit in which the plaintiff could obtain the relief he seeks in a bill was considered no answer to a motion to dismiss.

[September 19, 1870.]

Mr. *C. Moss* moved to dismiss the plaintiff's bill for want of prosecution. The bill had been filed on the 19th February, 1869; amended, October, 1869; defendant answered 8th November, 1869. The bill was further amended 15th November, 1869, the other three defendants answered 18th December, 1869, a *lis pendens* had been filed.

1870.

Guthrie v. Macdonald.

Mr. *Macdonald*, contra. The suit is by a judgment creditor, another suit is pending of *Johnson* v. *Macdonald*, in which he is made a defendant and could obtain the same relief as he sought in this suit, this made it unnecessary for him to prosecute the present suit.

THE SECRETARY.—But the pendency of the other suit is no answer to a motion like the present.

Mr. *Macdonald*.—All we have to shew is that we have used ordinary diligence, we are in a position to dismiss our own bill without costs. If the bill is dismissed, it should be without costs.

THE SECRETARY.—I think I must hold that the pendency of the other suit was no excuse for not proceeding with this suit: so I dismiss the bill with costs.

Judgment.

WILSON v. ROBERTSON.

Amending decree—Order 355.

The Secretary in Chambers will not grant an order to amend a decree, except to correct a clerical error, or to make the decree conform with the judgment.

Where the decree omitted to direct that costs should be paid forthwith, an application to amend was refused.

[September 21, 1870.]

Mr. *J. A. Boyd*, moved to vary a decree, contending that it was evident from the decree that a direction to pay costs forthwith was omitted, and the omission of such a direction was clearly an inadvertence.

Mr. *T. Moss*, contra. The alteration sought is of a nature that can not be made on a motion in Chambers, even if it could be shewn that any such omission as is complained of exists. The absence of such a direction,

however, was not inadvertent, but done advisedly, and was in accordance with the judgment. 1870. Wilson v. Robertson.

THE SECRETARY.—I refuse this application with costs. I do not think it comes within Order 335; even if it did, I see no reason for amending the decree. As it stands it is in accordance with the judgment. If the plaintiff had been given his costs up to the hearing, there would have been some reason for directing immediate payment; but here a reference is directed to a Master to make an enquiry and tax costs. The amount to which the plaintiff may be found entitled and the costs of the suit are to be paid in one month. This is the usual mode. To make the costs payable forthwith would involve two taxations; one now, and another of the reference when that is completed. Judgment.

ATTORNEY GENERAL v. ALEXANDER.

Granting loan of money in Court.

The Court will not grant a loan of money except to persons of undoubted credit, apart from the question of value of security offered.

Where the applicant was a young woman residing with her father the application was refused.

[September 22, 1870.]

An order was moved for to grant a loan of $500, now standing in Court to *Mary Jane Cunningham* on mortgage. A valuation of the property, shewing, as it was contended, that the property was a sufficient security, and a memorandum of the title was produced.

THE SECRETARY.—I refuse this order. The proposed borrower is a young woman living with her father, and the Court does not lend money except to persons of undoubted credit, apart from the mere question of the value of the property, proposed as security for the loans.

1870.

TURLEY v. MEYERS.

Sequestration.

Where a sequestration to compel the performance of a decree had been issued against a person who subsequently died. *Held*, that the writ could be revived against his heirs.

Semble, That sequestration issued on mesne process can not be revived.

[October, 1870.]

A sequestration had been issued against a defendant to compel the performance of a decree, the defendant died and the seqestration was revived. Afterwards one of the heirs made a lease of certain mill premises to a tenant, who was to make improvements and repairs on the property, and deduct the outlay from the rent. The sequestrators notified the tenant to attorn to them, and the tenant signed a memorandum agreeing to become tenant to the sequestrators "according to the terms of his tenancy." He subsequently made certain repairs, an account of which he furnished to the sequestrators, and claimed to have the amount allowed as part payment of his rent.

Statement.

Mr. *Hodgins*, for the plaintiff, moved to compel the tenant to pay the whole of the rent to the sequestrators without any deduction for the repairs.

Mr. *C. Moss*, contra, submitted that the sequestration had lapsed by the death of the defendant and could not be revived, that the tenant was not therefore bound to attorn at all, and although he had chosen to do so he only did so on the terms of his tenancy to the defendant's heir, and could only be compelled to pay rent according to it; and he urged that the sequestrator had acquiesced in that view, and waived any right he might otherwise have had by accepting the attornment and receiving payment on account of the rent.

1870.

Turley v. Meyers.

STRONG, V. C.—It is clear from *Pemberton* on Revivor, p. 153, and the authorities there collected that there is nothing in the point which was taken on these motions that the writ of sequestration cannot be revived. The distinction I find to be as I suggested between sequestration on mesne process, and the like process to compel performance of a decree. The former being for a personal contempt, dies with the person, the latter is susceptible of revivor, and of revivor against the heir or devisee where the lands would be assets available for the payment of the debt. As to the merits of this application, I have come to the conclusion that the Sheriff's Officer and *McCallan* misunderstood each other, the former supposing that by the attornment he was continuing the old tenancy at the former rental, whilst *McCallan* assumed that he was becoming tenant under the sequestration on the same terms he had agreed on with Mr. *Meyers*, who I need not say had no authority to make the lease. I think under this finding on the facts that the proper order to make will be as in *Reid* v. *Middleton* (*a*), (a case of a receiver), that it be referred to the Master to fix an occupation rent which *McCallan* should be charged with in respect of his past occupation, and that the Master do ascertain what rent is due by him on the footing of such occupation rental, giving credit for what he has paid the seqestrators, or what he has expended in necessary repairs; and that *McCallan* pay over the balance to the sequestrators, and that he be at liberty to elect either to continue his occupation at the occupation rent to be fixed, or to deliver up possession to the sequestrators who in that case should let the premises to a new tenant, first applying in the usual way for leave to set and let. I give no costs.

Judgment.

(*a*) T. & R. 455.

1870.

BEARD v. GRAY.

Computation of time—General Order 163—Setting down cause.

In computing the time for setting down a cause the day on which it is set down, and the first day of hearing are both excluded. There should fourteen clear days intervene.

[Chambers, October 14, 1870.]

Mr. *C. Moss* moved to strike this cause off the list of causes set down for hearing at the sittings at Cobourg, and to set aside the notice of hearing on the ground that the cause was not set "at least fourteen days" before the commencement of the hearing term as required by General Order 163.

Mr. *E. Crombie*, contra.

The cause had been set down on the 4th October for the 18th, and notice served on the same day.

Mr. *Moss* refered to General Order 163, *Zouch* v. *Empey* (*a*), *Reg.* v. *Trustees of Middlesex* (*b*), *Reg.* v. *Trustees of Salop* (*c*), *Reg.* v. *Aberdale Can Co.* (*d*), *Lester* v. *Garland* (*e*).

Judgment. STRONG, V. C.—This cause was set down by plaintiff, and notice of hearing served on the 4th of October for the Cobourg sitting on the 18th. The defendant moves to set aside the notice of hearing and to strike the cause out of the paper, upon the ground that it was not entered in due time. The question depends upon the meaning of the words "at least fourteen days" in the General Order 163. No authority is produced to shew that this order has received any judicial construction,

(*a*) 4 B. & Ald. 522. (*b*) 14 L. J., N. S., M. C., 139.
(*c*) 8 Ad. & E. 178, 7 L.J, N.S, M.C, 56. (*d*) 19 L. J., N. S., Q. B., 251.
(*e*) 15 Ves.; 248, 257.

though the U. C. Law Journal, vol. 3, N. S. p. 31, is referred to, but this merely states a *supposed* dictum of Chancellor *Van Koughnet* without referring to any case decided by him. I do not think I can treat this supposed dictum as binding me in the face of the strong and direct authorities produced by Mr. *Moss*, which shew that the words "at least" require that in the computation of the fourteen days, the day of entering and serving of notice should be excluded. Indeed if there was no decision in point, I should think it clear that the expression, "at least fourteen days," meant fourteen clear days. As there seems to have been an opinion in the profession, countenanced by the passage I have referred to in the U. C. Law Journal, *that* the contrary was the correct construction, I grant *the* motion without costs.

1870.

Beard v. Gray.

ALLAN v. GAMBLE.

Parties—Pleading—Demurrer—Where heir or personal representative should sue.

Where a bill had been filed against an alleged trustee for breach of trust, which it was stated in the bill consisted of the sale, and receipt by him of the proceeds of certain real estate, which by the terms of the trust he was to sell absolutely, and hold the proceeds on the trusts specified, *it was held*, that such a bill could only be sustained by the personal representative of the *cestui qui trust*.

A demurrer for want of equity to a bill by the next of kin was in such a case allowed with costs.

[Court, October 17, 1870.]

Mr. *Kennedy*, in support of the demurrer.

Mr. *Hodgins*, contra.

Mr. *Kennedy* contended that the bill shewed that the property in question had been converted into personalty, the sale was absolute, and the trusts could only be as to

1870.

Allan v. Gamble.

the proceeds, which were personalty, and the personal representative of the *cestui qui trust* was the only person interested and could alone file a bill.

Mr. *Hodgins*, contra, argued that here there was no personal estate to administer, and no administrator could be appointed. The plaintiff had a good equity against the personal representative, and could take his place, and seek his remedy against the wrong doing trustee; the orders of the Court were intended to apply to cases of this kind.

STRONG, V.C.—I do not consider that the orders of the Court apply at all, or have any bearing on the matter. I am clearly of opinion that the demurrer should be allowed. The statement in the bill shews plainly a conversion of the lands referred to into personalty, and the party beneficially entitled is the proper party to sue.

Judgment.

The only cases where a contrary course could be taken, would be where the personal representative fraudulently colluded with the debtor. The bill is clearly demurrable, not merely for want of parties, but for want of equity. I therefore allow the demurrer with costs. I refuse leave to amend: the present plaintiff appears to have no *locus standi*. A bill by the personal representative will be a new bill, and cannot be made under an order to amend.

1870.

HARRIS v. MEYERS.

Sequestration—Delay in proceeding.

When a sequestration had issued to compel payment under a decree, and there appeared to have been considerable delay in enforcing the payment of rents, during which period the defendant had died and one of his heirs had received sundry sums for rent, a motion that such rents be paid over again to the sequestrators by the tenants was refused, and the tenants ordered to attorn as to future rents only.

[Chambers, October 21, 1870.]

Mr. *Hodgins* moved that certain tenants of premises sequestered in this cause be ordered to pay arrears of rent to the sequestrator, and that they be ordered to attorn, and sequestrator have liberty to sue, &c.

It appeared from the affidavit filed, that one of the tenants had died, and the present tenant, *Andrew S. Barton*, had received no notice of the sequestration proceedings and had paid the rent to one of the heirs,— another, *Ferguson*, had not been served with notice to attorn, and had paid the rent to the heir under threat of distress; he had not been called on for rent for two years. The defendant in the cause against whom sequestration had originally issued had died 21st August, 1868, the suit was revived 16th April, 1869, the application to compel payment had been first brought on in March, 1870. Statement.

Mr. *Bain*, on the part of the several tenants, urged the great delay that had taken place on the part of the plaintiff, that the tenants had been obliged to pay under threat of distress, and should be protected: he cited *Wilson* v. *Metcalfe* (*a*).

Mr. *Hodgins*, contra, referred to the judgment of the Chancellor in *Harris* v. *Meyers* (*b*), contending that the

(*a*) 1 Beav. 263. (*b*) 2 Chan. Chamb. 121.

1870. tenants should pay to the sequestrator, and had paid the heir at their own risks.

Harris v. Meyers.

STRONG, V. C., held that as to the rents already paid no order should be made against the tenants, but that they be ordered to attorn and pay future rents to sequestrators.

WALKER v. NILES.

Interpleader—Security for costs.

The claimant under an interpleader issue, if out of the jurisdiction, is bound to give security for costs.

[Chambers, October 21, 1870.]

Statement.

Mr. *Spencer* moved on the part of plaintiff to amend an interpleader order granted in this cause, by extending the time for trial of the interpleader issue, the time granted having expired; and that the claimant of the goods the plaintiff in the trial, give security for costs, he having left the jurisdiction.

Mr. *Boyd*, contra.

There having apparently been delay in proceeding with the trial, the claimant was put upon terms to go to trial either at the coming Assizes at Cobourg, or the Winter Assizes at Toronto; and it being shewn that he had left the jurisdiction, he was ordered to give security for costs.—STRONG, V.C.

1870.

FRIETSCH v. WINKLER.

Amendment—Changing venue.

Under an order to amend obtained on *præcipe*, a change in the venue laid in the bill cannot be made.

A cause set down for hearing at the county town named in the amendments, was ordered to be struck out of the list.

[Chambers, October 21, 1870.]

Mr. *A. Hoskin* moved to strike this cause out of the the list of causes for hearing at the hearing and examination term at Goderich, on the grounds that the venue had not properly been laid at Goderich, and the cause was irregularly set down for hearing.

The facts, established by the affidavits filed, and as far as they are material appeared to be, that the venue in the bill was originally laid at Walkertown,—where no sittings of the Court are held, that subsequently plaintiff obtained an order to amend on *præcipe*, and amended the bill on the files by changing the venue to Goderich, but the office-copy bill was not amended, nor was a copy of the order to amend served. A notice of setting down cause was served on defendant's solicitor, stating by mistake Guelph as the place of hearing; on discovering this error plaintiff served defendant's solicitor with a notice of countermand which he accepted, and plaintiff's solicitor, as he alleges, then told defendant's solicitor that the cause was to be heard at Goderich, and mentioned the change made in the bill filed, and afterwards gave notice of hearing for Goderich. The defendant had answered. Statement.

Mr. *Hoskin* contended that a change in the venue of a bill could not be made under an *ex parte* order to amend. That even if it was otherwise, here the amendments had never been completed, the office-copy bill not

1870.

Fristach v. Winkler.

having been amended or the order to amend served. It was clearly irregular to set down the cause for Goderich, if plaintiff desired to change the venue, he should have moved on notice to do so.

Mr. *C. Moss*, contra, argued that an amendment of a bill might be made in the margin as well as in the body of the bill, that such amendments came within order 80 as to the correction of clerical errors,—plaintiff could obtain such an order at any time—the plaintiff could change the venue by amending. The defendant if he wished to change it must of course move on notice. As to the irregularity in making the amendments and amending office-copy bill, defendant cannot now allege that objection, having waived it by answering. The notice of hearing at Goderich had been given nine days before the application was made. The delay in moving was itself a waiver of any irregularity.

Mr. *Hoskin*.—As to the delay in applying, we come thirteen days before the sittings which should be early enough.

Page 130, Con. Orders, 221; Order 79; Order 80 were referred to.

Judgment.

THE SECRETARY considered that the irregularity as to the amendments had been waived by the defendants answering, that defendant had had notice of the change of venue on the 31st August, (the time of the service of the countermand of the notice for Guelph, and the conversation with regard to the change to Goderich), and held that a change of venue could be made under an order to amend. From this decision the defendant appealed, and the matter came on to be heard before *Strong*. V. C.

Mr. *Fitzgerald*, for the defendant, appealing, Mr. *Moss*, contra.

1870.

Frietsch v. Winkler.

Mr. *Fitzgerald* took the same grounds as had been taken before the Secretary on the part of the defendant, and argued that no change in the venue had in reality ever been made, no notice of such amendments as it was contended had been made was ever given to defendant, the only way of notifying him was to amend his office-copy bill, and not to give him verbal notice in a casual conversation. To hold otherwise would unsettle the practice. No order to amend had been served, and it could not be contended that defendant was bound to notice such an amendment if it could be made, which it was contended it could not be under an *ex parte* order to amend.

STRONG, V.C.—The defendant's solicitors were justified in relying on the office-copy. I cannot impute notice to him merely from the alleged casual conversation; my opinion is, that no change of venue can be made under an order to amend; and I shall act on that view in the absence of any authority to the contrary. The order must be reversed with costs.

Judgment.

THOMPSON v. MACAULAY.

Sale instead of foreclosure where refused.

After a decree for foreclosure, the defendant applied in Chambers for an order for sale, the property mortgaged being worth $1000, and the mortgage being for $157; and that the usual deposit might be dispensed with. The Secretary considered the General Order imperative, and refused the application.

[1870.]

Mr. *Fenton* moved on notice on behalf of the defendant for an immediate sale of his lands, instead of foreclosure. He also asked to be relieved from paying the usual deposit. The defendant shewed by affidavit that he is very ill, and unable to work, and very poor. The

1870. land is said to be worth $1,000 cash, and the mortgage about $157.

Thompson v. Macaulay.

Mr. *Fenton* said that the object of requiring the deposit, was to prevent the danger of loss to the plaintiff of the expenses of a sale. Here there was no danger of it, as the land was worth $1,000, and the mortgage was only $157.

Mr. *Moss*, contra, said the plaintiff was an executrix, and, acting in that fiduciary position, could not consent. He thought that if the property was worth so much, the defendant would do better to raise a new loan upon it.

Judgment. THE SECRETARY refused the application. He could not vary a decree in Chambers, and could not dispense with payment of the deposit in the face of the General Order.

SEYMOUR v. LONGWORTH.

Production of documents.

Under an order to produce taken out by one defendant, other defendants have no right to compel production or inspection.

A motion for a further affidavit by a defendant under such circumstances refused with costs.

Mr. *C. Moss*, for defendants, moved for an order that plaintiff make further affidavit on production, or, in default, that the bill be dismissed.

It appeared that the plaintiff resided in England, and that the business to which the suit related was carried on in this Province by an agent, who made the affidavit on production, and offered to produce all books, papers, &c., relative to the matter.

1870.

Seymour v. Longworth.

Mr. *Moss* contended that the order and affidavit on production was a practice established in lieu of the interrogatories as to documents, under a bill by plaintiff or a cross bill if defendant was seeking the discovery, and that he was entitled to an affidavit by the party. He cited *Beaufort* v. *Taylor* (*a*), *McIntosh* v. *G. W. R. Co.* (*b*), *Wyman* v. *Bradstreet* (*c*), *Phillips* v. *Evans* (*d*).

Mr. *Macdonald*, contra. This application is made by the defendants *Longworth & Lizars*. The order to produce was issued on the application of the defendant *Longworth;* the defendant *Lizars* cannot therefore be heard on this application. *Longworth* is not entitled to production, as he has filed a disclaimer. Under the old practice if the defendant wished to obtain discovery he was obliged to file a cross-bill, but could only have discovery of facts material to his defence to the original suit: here the defendant *Longworth* offers no defence, but in fact disclaims all interest in the suit, and cannot therefore obtain discovery or production. He cited *Walker* v. *Kennedy* (*e*), *Nicholl* v. *Elliott* (*f*).

Judgment.

THE SECRETARY.—This motion must be refused. Under an order to produce issued by one defendant, other defendants have no right to compel production or inspection. The defendant *Longworth*, on whose behalf this application is made, could not have filed a cross bill for discovery, so he cannot enforce production. Motion refused with costs.

(*a*) 2 Hare, 245.
(*b*) 16 Jur. 989.
(*c*) 2 Chan. Chamb. R. 77.
(*d*) 2 Y. & C. 647.
(*e*) 5 W. R. 396.
(*f*) 3 Grant 586.

1870.

HOOPER v. HOOPER.

Alimony.

Where in an alimony case, no one appearing for the defendant, an order had been made for interim alimony for the amount endorsed on the bill, which the defendant considered excessive: on a motion by him to set the order aside, a reference was directed on payment of the costs (*dives costs*) of the application.

[December, 1870.]

Mr. *Cattanach* moved to set aside an order made for the payment of $50 per month *interim* alimony, the bill had been endorsed for that amount, and no one appearing for the defendant the order had been granted; on an application to the Secretary to open the matter, he had desired that it be brought before a Judge.

Mr. *McLennan* objected that the motion was in effect an appeal from the order, and should be treated as such; it should be made on the usual notice and confined to the material on which the order was made.

Argument.

Mr. *Cattanach* did not move by way of appeal, but came now to make a substantive motion on new material; it had been by mistake that no one appeared before the Secretary; it was never intended to admit the correctness of the amount claimed. He then proposed to read affidavits to support a case for reducing the amount, when

Mr. *McLennan* objected that no notice of reading these affidavits had been given on the original motion before the Secretary.

The affidavits were allowed to be read, and Mr. *Cattanach* contended that they made out a sufficient case for a reference to the Master to inquire the amount of defendant's estate, and report a proper allowance; $50 a month was an excessive amount, when it is considered

1870.

Hooper v. Hooper.

that here defendant sets up adultery; and if he succeeds at the hearing, he would be injured by having had to pay a large sum for *interim* alimony in the meantime. He referred to *Severn* v. *Severn* in this Court. (*a*).

Mr. *McLennan*.—The order made must *prima facie* be held to be correct. The first ground relied on as to the alleged mistake, is merely an allegation of negligence on defendant's part; it is not even shewn how such negligence occurred, and the Court will not indulge a party under such circumstances; he makes no case therefore for indulgence. As to the allowance being excessive, the presumption is that it is right; and it is not expedient nor the policy of the Court on a motion like the present to go into the merits; the allowance is only temporary, and the merits will be dealt with at the hearing. The plaintiff stands in the same position as if he had opposed the order before the Secretary. Motions will be entertained to reduce permanent alimony, but not *interim* alimony; a contrary course would lead to endless applications to reduce or increase *interim* alimony, to the harassing of both plaintiffs and defendants, a result to be discouraged by the Court. But, apart from the question of the expediency of interference, defendant has made no case for a reduction of the amount; he speaks only in general terms and says he is poor, but gives no particulars of his circumstances; he does not deny selling large timber limits, receiving $2000 in payment and a mortgage for a large amount; he tells nothing as to what his receipts are from his mill, and gives no opportunity to the Court of judging, whether the allowance is too much or too little, all of which it was necessary to have done; the farm spoken of is in his hands, but he neglects to shew what he makes out of it. As to the question of adultery, a defendant might by setting that up resist an allowance in every case up to

Argument.

(*a*) 7 Grant R. 109.

1870. the hearing. Vic. 32, c. 15, s. 81, Ont., and *Glennie* v. *Glennie*, were referred to.

Hooper v. Hooper.

Mr. *Cattanach*, in reply, argued that the defendant shewed that the farm left him was worth less than the encumbrances on it, and the rental would not pay the interest on them, and, besides that, he says he has no property.

MOWAT, V. C.—The defendant's affidavit is not altogether satisfactory, but under the practice he is entitled to a reference, and it must be granted on payment of costs (which will be *dives* costs) of this application, but not the costs of the reference.

[Mr. *McLennan* pressed for the costs of the reference also, on the ground that defendant was obtaining an indulgence.]

Judgment

THE VICE CHANCELLOR.—I feel that; and that is the reason I give the costs of the application; but as to the costs of the reference, under the statute you would be only entitled to disbursements if you fail in the suit. The order will direct that the Master name the amount of the disbursements, unless the full amount of $50 per month is found properly payable—in which case defendant must pay full costs of the reference.

1870.

JONES v. HUNTINGDON.

Scandal and impertinence—Examination of plaintiff.

Plaintiff filed a bill for specific performance of a contract, alleged to be made with defendant at an auction sale of lands at which plaintiff was a bidder, the defendant set up that plaintiff bought as his agent, that plaintiff was a *puffer*, and the sale illegal. Plaintiff moved to strike out the allegations as to the sale being illegal on the grounds stated as scandal and impertinence, and defendant moved that plaintiff submit to examination, he having refused to answer questions relating to the alleged fraudulent features of the transaction.

Held, that the matter being material was not scandalous, and that plaintiff must answer all proper questions.

[November, 1870.]

Hon. *E. B. Wood*, for plaintiff, moved on notice to strike out certain passages and allegations contained in in defendants' answer, on the ground that they were scandalous, impertinent, and irrelevant.

Argument.

Mr. *J. A. Boyd*, contra, and by way of cross motion moved that the plaintiff be ordered to attend and be examined and answer certain questions which had been put to him (founded on the alleged scandalous matter), or be committed, or that he be ordered to answer, and in default that the bill be dismissed. It appeared that the plaintiff had filed his bill against the defendant alleging a purchase by him, the plaintiff, of certain premises from the defendant, and praying specific performance. The defendant answered denying any contract, alleging that no memorandum in writing had been signed by him and pleaded the Statute of Frauds, and also alleging that the lands in question were put up for sale at public auction, that the defendant had requested the plaintiff to attend and bid in certain lands, that plaintiff had consented and agreed so to bid as his agent, that the plaintiff did so attend and bid at the said auction, and the lands in question were knocked down to him—that

1870.

Jones v. Huntingdon.

such sale was without reserve, and that plaintiff was a *puffer* at the sale and his act illegal—that plaintiff had so acted at the auction as to injure the sale, that the property was worth a very much larger sum than that offered, and that the whole proceeding was a scheme of the plaintiff to get the lands cheap.

Mr. *Wood.* The bill sets up a contract and asks specific performance, to this the defendant answers sufficiently pertinently in the 1st, 2nd, and 3rd paragraphs of his answer; but he then goes further and sets up an agreement for an illegal purpose proposed by himself and completed and carried out by himself and the plaintiff, and by that avoidance of law and merits seeks to get rid of the plaintiff's claim. Is it competent to a party in that position to set up the Statute of Frauds? he was a party in *pari delictu.* He cited *Malins* v. *Freeman* (*a*), *St. John* v. *St. John* (*b*), *Story* (*c*), *Smith* v. *Reynolds* (*d*).

Argument.

Scandal will not be struck out if it is pertinent, but here the bill was sufficiently answered, the matter therefore was not pertinent—can a party set up his own illegal acts,—the statute forbids it. The answer sets up that the transaction is void as against public policy, but it does not lie in the defendants mouth to urge this, when the parties are *pari delictu*, here no third parties are concerned. No innocent party is injured—and the transaction is no more against public policy than it would have had the Act 30th Vic. not been passed, the principle does not apply as between the parties themselves. (*e*).

Mr. *Boyd.* If relevant at all, the matter complained of can not be scandalous. (*f*).

(*a*) 4 Bing N. C. 395. (*b*) 11 Ves 526.

(*c*) Sec 862. (*d*) Mosley 69.

(*e*) *Broom's* Criminal Law, 361; *Broom's* Legal Maxims, 692; *Re* Ashe, 4 Ir. Ch. 395; 31 Vic. 1 Ont.

(*f*) See Mad. Pr. 391; B— v. W— 31 Beavan, 342.

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The question raised by the alleged scandalous statements cannot be decided until the suit is tried and its relevancy tested. The question will be properly disposed of at the hearing and cannot be decided on a motion like the present. Even if the revelancy could be considered now, will the Court say that the case set up by the answer is not relevant to the matter of the bill. If the contract is legal the Court will enforce it, if not legal the Court will refuse the relief with costs; the matter if impertinent will be struck out with costs, the Court will provide for this at hearing; if, however, it is a good defence, as here contended, it will not be struck out. (*a*).

On the cross motion Mr. *Boyd* contended that the plaintiff was liable to answer the questions put to him, and in default should be committed; he should at any rate be ordered to answer the questions put to him, or the bill be dismissed: he cited *Grainger* v. *Latham*. (*b*).

Judgment.

STRONG, V. C.—The questions raised on these two motions appear to me to resolve themselves into one as to the revelancy of the defence set up in the answer. The plaintiff in his bill states that he purchased at public auction certain premises of the defendant, and seeks specific performance of the contract thus made, the defendant answers that the plaintiff bought such premises in pursuance of an arrangement between them and as agent for the defendant, and that the plaintiff was a puffer at such sale, and the purchase was in contravention of the Act against puffers, 31 Vic. Ont. 1. The plaintiff moves to have such statements in the answer struck out as scandalous and impertinent, and the defendant moves that plaintiff be ordered to submit to examination as to the alleged facts attending such

(*a*) *Re* Ashe, 4 Ir. Ch. 395; Edwards v. Lord Brougham, 1 W. N. 93.
(*b*) 2 Chan. Chamb. 313.

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sale. I cannot say but that the circumstances set up by way of defence are pertinent to the issues raised in the plaintiff's bill; and if this is so, the plaintiff is bound to answer any proper questions that may be put to him in respect of them.

The motion to strike out the passages complained of will therefore be refused, and an order made that plaintiff answer the questions, or in default that the bill be dismissed.

CHARD v. MEYERS.

Appeal.

There is no appeal from a decision on a question which is by the practice purely within the discretion of the Judge.

An appeal from a Master was allowed after an interval of six months (the long vacation intervening) when it was considered that the interests of justice warranted it.

[November, 1870.]

Argument.

On the 16th September, Mr. *D. B. Read*, Q.C., applied to the Secretary for leave to appeal from a report of the Master at Belleville, which had been filed on the 25th March previous. He urged that the vacation had intervened, and the fourteen days during which he ought to have appealed, were lost to him in consequence of the miscarriage of a letter, which had by mistake been sent to defendant's house, and which would have informed him of the fact of the report having been signed. He referred to *Thomson* v. *Walker* (*a*), and *Cousins* v. *McDougall* (*b*).

Mr. *Macdonald*, contra, urged the delay, and claimed that the motion should be dismissed with costs.

(*a*) 1 Cham. R. 266.

(*b*) 1 Cham R. 213.

THE SECRETARY remarked that the affidavit filed did not shew when the letter spoken of was first read by defendant, that the delay was not satisfactorily accounted for, and refused the application with costs. 1870. Chard v. Meyers.

The Judge, whose week in Chambers it was, and whose name the order made by the Secretary bore, was absent, and at the request of the parties *Strong*, V.C., entertained an appeal from the Secretary's decision, and reversed the order.

The matter came on to be reheard before the full Court.

Mr. *Spencer*, for the plaintiff, who reheard.

Mr. *D. B. Read*, Q.C., contra.

Mr. *Spencer* contended that the Secretary's order should be assumed to be correct until shewn to be bad, —it is in effect the order of the Judge whose name it bears,—and was proceeding to argue that no sufficient case was made before *Strong*, V.C., for setting it aside. He referred to the orders giving the Secretary jurisdiction, Nos. 329, 210, and to *Gourlay* v. *Ingram* (*a*), *Gibbs* v. *Murphy* (*b*), *Bank of Montreal* v. *Wilson* (*c*); when the Court suggested that the matter was one purely discretionary with the Judge who made the order, and that an appeal would not lie. Argument.

Mr. *Spencer* said that there were no reported case establishing that principle, and referred to *Allen* v. *Henderson* heard before the Chancellor in November instant, where an order of the Secretary dismissing the bill had been appealed from and the appeal entertained, and the order of the Secretary was, as he had contended,

(*a*) 2 Chan. Chamb. 288. (*b*) 2 Cham. R. 132. (*c*) 2 Chamb. R. 117.

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Chard v. Meyers.

McDonell v. *McKay* (*a*), was referred to as a reported case in this Court expressly on this point. The Court without calling on Mr. *Read* to reply, dismissed the appeal with costs.

McConnell v. McConnell.

In an administration suit, after delay on the part of the plaintiff, the conduct of the reference was given to a solicitor representing certain creditors of the estate. The plaintiff's solicitor, with the consent of the defendant's solicitor, but without notice to the solicitor of the creditors, or informing the Court that such solicitor had the conduct of the reference, applied in Chambers, and obtained an order to change the venue from Goderich to Stratford. Such order was on application set aside with costs.

[November 19, 1870.]

Argument. Mr. *Cassells*, for creditors having the carriage of the decree, moved to set aside an order made in Chambers for changing the reference in this cause from the Master at Goderich to the Master at Stratford.

The suit was for administration against an executor by a legatee. A decree had been obtained with a reference to Goderich. The decree was carried into the Master's Office, 4th February, 1870. On the 21st April, plaintiff not having proceeded, the carriage of the decree was given to the defendant. On the 22nd May, a solicitor was appointed to represent certain creditors interested in the estate; and, nothing further having been done, on the 11th October last he applied to the Master at Goderich for the carriage of the decree, which was given to him. On the 12th October he took out and served a warrant to proceed. On the 14th October the plaintiff applied in Chambers for, and obtained an order

(*a*) 2 Cham. R. 245.

changing the venue from Goderich to Stratford, on consent of the defendant's solicitor, and without notice to the solicitor for the creditors. This order was acted on under protest by the solicitor for the creditors; and evidence was taken before the Master at Stratford. The present application was to set aside the order. 1870. McConnell v. McConnell.

Mr. *Cassells* objected to the order on the ground that it was obtained without notice to Mr. *Elliott* who, on behalf of the creditors, had the carriage of the reference at the time.

Mr. *C. Moss*, for the plaintiff, in support of the order, contended that the order was taken out in consequence of an agreement between the solicitors for plaintiff and defendant before the carriage of the decree was given to the creditors, and while it was competent for them to make such an arrangement; that the warrant taken out by Mr. *Elliott*, the solicitor for the creditors, had not been acted on; that the fact urged of the change of carriage of the decree not having been brought to the notice of the Secretary was not of the importance contended for on the other side, as the cases of *suppressio veri* were cases where the suppression was wilful, which was not the case here. Argument.

The Vice Chancellor drew counsel's attention to the fact that the order was obtained whilst Mr. *Elliott* had the carriage of the decree; and, apart from the question of whether the Master should have given him the carriage, Mr. *Elliott* was entitled to notice, and there was an irregularity in the order being taken *ex parte*.

Mr. *Moss* argued that the objection of the order being made *ex parte* should have been stated in the notice of motion. The grounds stated in the notice was the suppression of facts before the Secretary; this was what

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he was called on to meet, and the Court could not now consider the other alleged ground. The first question was whether the suppression was wilful or innocent and inadvertent; if not wilful, then the Court could consider the merits generally, and the regularity of changing the carriage of the decree; if wilful, then he could not claim that the merits could be gone into. He further contended that a solicitor acting for a small class of creditors, which represented but a small portion of the estate, ought not to have the control where, as here, the assets were large —the claims were small, and there was no difficulty in paying them,—the bulk of interest was on the part of the legatees, and they would be more careful in looking into, and testing and falsifying the adminstrator's accounts, whereas the interest of the creditors would cease with the payment of their claims; the solicitors of all parties chiefly interested had agreed in having the reference transferred to Stratford, which was a consideration of merit entitled to weight: he referred to *Penny* v. *Francis.* (*a*).

Judgment.

THE VICE CHANCELLOR.—After the cause standing for eight months in the Master's Office without any step being taken, I can not say that the Master was not right in giving the carriage of the decree to the creditors.

Mr. *Moss.* The plaintiff is now prosecuting his suit with diligence and taking evidence at Stratford, not in consequence of any pressure from Mr. *Elliott;* and the delay previous was accounted for by the absence of the solicitor for defendant, with whom the defendant was seeking a settlement to enable him to complete his accounts, and it was useless pressing him in the absence of such solicitor.

Mr. *Cassells* had not thought it necessary to file affidavits, as the merits could not be gone into on the present motion.

(*a*) 7 Jur. N. S. 247.

MOWAT, V. C.—[Without calling on Mr. *Cassells* to reply.]—I think it clear the order must be discharged. When it was obtained, the creditors had the carriage of the decree, and the fact ought to have been stated to the Court. I am not prepared to say that if I had to go into the merits, I should be inclined to order that the plaintiff should have the carriage of the decree,—his delay has been very great, and the explanation of it is not satisfactory. The application must be granted with costs. 1870. McConnell v. McConnell.

McMURRAY v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Staying proceedings pending an appeal.

An application to stay proceedings pending an appeal from an order overruling a demurrer, is to the discretion of the Court.

Where allowing plaintiff to proceed would so prejudice the defendant as virtually to defeat the appeal, proceedings will be stayed, but where defendant fails to shew that he would be prejudiced, a stay will be refused.

In a case where the stay moved for was refused, the Court ordered that any answer put in should be without prejudice to the appeal from the order overruling the demurrer.

[November, 1870.]

Mr. *Cassells*, moved on the part of the defendants, the Railway Company, for an order that all proceedings be stayed pending an appeal by the defendant from the judgment of *Strong*, V.C., on the demurrer to the plaintiff's bill. Argument.

The defendant had demurred to the plaintiff's bill for want of equity and for want of parties. This demurrer had been overruled by *Strong*, V.C., and an appeal made from the Vice Chancellor's judgment; the

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present motion was for a stay of proceedings pending such appeal.

Crooks, Q.C., and Mr. *Rae*, contra, took a preliminary objection that the motion should have been brought on to be heard before the Judge who had heard the demurrer. This under the circumstances was overruled.

Mr. *Crooks* proceeded to argue the motion, contending that the defendants were not entitled to any stay of proceedings: he referred to Con. Orders 369, *Morgan's* Orders, *Lord* v. *Colvin* (*a*), *Garcias* v. *Ricardo* (*b*), as to staying proceedings pending order overruling plea; *King of Spain* v. *Machado* (*c*).

Argument.

Mr. *Cassells* contended that the defendant had a right to a stay of proceedings; an appeal from an order on demurrer stands in a different position from an appeal from a decree. In the latter case it was a matter of discretion, but in the case of a demurrer a defendant would be obliged to answer and disclose his case, and the injury of so doing might be irreparable: he cited *Smyth* v. *Simpson* (*d*), *Boulton* v. *Church Society* (*e*), *Wood* v. *Milner* (*f*), *King of Spain* v. *Machado* (*g*), *Garcias* v. *Ricardo* (*h*).

Mr. *Crooks* argued that the application was made on insufficient materials, it is not shewn that the bond for security for cost of appeal is filed; and if filed, it is not yet allowed as sufficient, no sufficient *prima facie* case is made out, and nothing to prove that the proceedings are not merely dilatory: he cited *Drake* v. *Drake* (*i*),

(*a*) 1 Drew. & Sm. 475.
(*b*) 1 Phill. 498.
(*c*) 4 Russell 560.
(*d*) 1 U. C. E. & A. R. 40.
(*e*) 2 Chan. Chamb. 377.
(*f*) 1 J. & W. 636.
(*g*) 4 Russ. 560.
(*h*) 1 Phill. 498.
(*i*) 3 Hare 523.

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Saunders v. *Richardson* (*a*), *Cheesewright* v. *Thorn* (*b*). He contended further that the defendant would not be prejudiced by answering, inasmuch as answering here did not as in England involve discovery, and that therefore the English cases were not necessarily applicable: he cited *Penn* v. *Bibley* (*c*).

Mr. *Cassells*, in reply, pointed out that the discovery on cross-examination here was equivalent to answering fully as in England, and, that the very cases cited by Mr. *Crooks* to shew that the granting a stay of proceedings was discretionary with the Court, shewed also that in such cases the stay was granted. The Court in England was favourable to granting a stay: *Barrs* v. *Fewkes* (*d*).

Judgment.

SPRAGGE, C.—It is not contended that further proceedings in the cause are stayed by this appeal; the application to stay proceedings proceeds on the assumption that they are not so stayed, but that an order of the Court is necessary. I think it is not as of course to stay proceedings upon an appeal from an order overruling a demurrer. Where indeed the putting a defendant to answer would have the effect of defeating the appeal, there is an obvious propriety in the English decisions, that in such a case proceedings will be stayed; and it is put by Mr. *Morgan* (*e*) "when a demurrer or plea to discovery has been overruled, and the defendant appeals, the Court will stay proceedings to enforce an answer if there has been no delay, or if the defendant would be prejudiced by answering;" but the terms in which this is put, shew that it is inapplicable to our practice. We do not enforce an answer, and as to discovery by examination after answer, the party applying to stay proceed-

(*a*) 2 W. R. 358. (*b*) W. N. (1869) 81, Dan. Pr. 1351.
(*c*) 8 L. R. Eq. 308. (*d*) 1 L. R. Eq. 392.
(*e*) Morgan's Orders 522.

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ings must shew that he would be prejudiced in that respect if the cause be allowed to proceed. The application is always to the discretion of the Court, and where allowing the plaintiff to proceed would virtually defeat the appeal, as would be the case where discovery would be obtained, which the defendant contends the plaintiff is not entitled to, proceedings will be stayed but where the defendent fails to shew that he would be prejudiced, they will not be stayed any more where the order appealed from is an order overruling a demurrer, than where the order is of a different nature. I cannot do better upon this point than quote the language of Sir *James Wigram* in *Drake* v. *Drake* (*a*). Referring to the case of *Wood* v. *Milner* (*b*), before Lord *Eldon*, he says, "If the case of *Wood* v. *Milner* be an authority for the proposition that whenever an order overruling a plea or demurrer to discovery is appealed from, the motion to stay the plaintiff's proceedings to enforce an answer, pending the appeal is a motion of course, I have nothing to do in the present case but to make the order which the defendant asks. But I am satisfied that case is no authority for any such proposition, in this as in similar applications the discretion of the Court is appealed to." I may add that in my judgment such a proposition as was supposed to be involved in the decision of *Wood* v. *Milner* would be an unsound one. As a matter of discretion, I think I ought not to stay proceedings in this case. It is not suggested, nor is there room for the suggestion, that the putting in of an answer, or the examination of officers of the Company, would be any prejudice to the Company. The case is of altogether a different nature from those in which such an argument could be urged. It is a case turning, mainly at least, upon the construction of Acts of Parliament and upon documentary evidence. The venue is laid at Whitby, where the Sittings commence on the 18th of the present month,

Judgment.

(*a*) 8 Hare 529. (*b*) 1 J. & W. 686.

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the Court of Appeal sits in January next. If I should stay proceedings and the order appealed from be affirmed, the plaintiff will have been thrown over to the Spring Sittings by reason of an appeal from an order which was rightly pronounced. Should the plaintiff succeed at the hearing the defendant may appeal from the decree, raising probably the same question, or substantially the same question, as has been raised by the demurrer; though there may of course be questions of fact upon which as yet no judgment is pronounced. If, on the other hand, the defendant should succeed at the hearing, it will be for the plaintiff to appeal if so advised. Looking at the fact that staying proceedings now would involve a delay of some five or six months, or perhaps more, in bringing the cause to a hearing, and perhaps a still longer delay before the final disposition of the case, that it is probably material to the plaintiff to have an early adjudication upon his rights, with a view to his dealing with the property which he has leased from the City, and that so far the judgment of the Court is with him; and seeing no detriment to the defendant at all correspondent to that which would be suffered by the plaintiff in case it should turn out that he is in the right, I think the balance of convenience is in favour of not staying proceedings. It is suggested, however, that if the defendant the Railway Company should be put to answer, which of course the Company may be expected to do if proceedings are not stayed, there would be an end of the demurrer. If this were the inevitable consequence it would be some reason for staying proceedings.—there is a conflict of authority upon the point. I think it will be proper to take a course analogous to that taken in *Sanders* v. *Richardson* (*a*), *i.e.*, order that any answer put in by the Company shall be without prejudice to the demurrer. The costs of this application must be paid by the Railway Company.

Judgment.

(*a*) 2 W. R. 358.

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Subpœna.

To compel the attendance of a witness, or a party whom it is sought to examine, he must be duly subpœnaed or served with an appointment eight days previous to an examination.

A subpœna should not be dated prior to the time at which the party taking out such subpœna is entitled to examine the party or witness served with subpœna.

Where a party plaintiff in a cause had been served with a subpœna dated before he was regularly liable to examination—a motion to commit him or dismiss his bill was refused but without costs.

[November, 1870.]

Mr. *Cassells* moved to commit the plaintiff for not attending to be examined in pursuance of a subpœna and appointment served upon him, or in the alternative that the bill be dismissed.

Argument. Mr. *Rae*, contra, admitted the regularity of the appointment, but objected to the regularity of the subpœna, and submitted that plaintiff was not bound to attend on it, he argued that until answer filed, the defendant had no right to examine the plaintiff, here the subpœna was dated before the answer filed, the subpœna should bear date the day of the issuing of the appointment, or certainly a date after the filing of the answer, the strict practice is that an appointment should be taken out first: he referred to *Daniel* 820, 839, vol. 3, 746. In England the practice is, that the appointment must be first obtained, here subpœnas are sometimes issued without regard to any appointment, but they certainly should be dated at the time when the party using them was entitled to examine.

Mr. *Cassells*, contra, argued that the subpœna was perfectly regular, that the practice of the Clerk of Records and Writs (a practice authorized by English authority)

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is to issue subpœnas in blank to the various solicitors and for the solicitors to fill them in. He also contended that the date was not a necessary part of the subpœna, that the solicitors could fill in the date themselves. It might be objected that the subpœna bore date subsequent to the date of the appointment, but before issuing a stamp had to be affixed to the subpœna, and under the Stamp Act had to be cancelled on the day of issuing, and if it was held that the subpœna must bear date subsequent to the appointment, then the practice of the Clerk of Records and Writs issuing subpœnas in blank would be of no practical utility. He also urged the inadvisability of such a rule, and illustrated it by the case of a party in Ottawa desiring to examine a witness, he had first to take out an appointment, then write to Toronto for a subpœna (because under *Waddell* v. *McGinty* (*a*), a Deputy Master has no power to issue a subpœna), in the mean time the witness may have left the country; and further the seal of the Court on the writ and the signature of the custodian of the seal was the main and important part of the writ, and even if the date was not accurate the subpœna must still be considered regular; that there was a manifest difference between a subpœna to compel attendance of a witness and a subpœna which under the existing practice of the Court was a step in the cause, that the plaintiff was bound to move to set aside the subpœna, and could not treat it as a nullity, and even admitting the subpœna to be irregular, a subpœna was unnecessary, the plaintiff was bound to attend on the service of a copy of the appointment alone. In support of this position he referred to Order 138, and Order 23, sec. 7, which places witnesses on the same footing as parties to a cause, and Order 144 which directs that a party refusing to attend may be punished for a contempt, and 266 which compels the attendance of a witness by a writ of

Argument.

(*a*) 2 Ch. Cham. R. 445.

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subpœna; he argued that it was clear that a party was in a different position from a witness; that Order 138 only referred to compelling a party to testify and not to his attendance; 144 speaks of the place appointed; and if a subpœna were necessary then the clause giving liberty to treat a party not attending as guilty of a contempt was unnecessary, the General Order provides for such a case. In England a subpœna is unnecessary (*a*); and further it was the duty of the plaintiff to attend and facilitate defendant as they were on terms to take short notice. The plaintiff too was an officer of the Court, and the dignity of the Court should be sustained, and a party relying on a technical objection should be fully able to substantiate his position. By his non-attendance the plaintiff admitted the defendants answers, and the bill should be dismissed.

Judgment.

MOWAT, V.C.—It would not be consistent with the practice (in my opinion) to commit the plaintiff or dismiss the bill. You must either serve a subpœna, under the orders, or give eight days' notice under the Statute. The English practice is different from ours. I do not admit the distinction contended for as made by the orders between a party and a witness, a subpœna is necessary in either case. I must hold that the subpœna in this case having been issued on the 3rd November, when it bears date, the answer not being then filed, was premature; and that the subpœna was consequently irregular. This is all that it is necessary to decide on the present application. The motion must therefore be refused, but without costs.

(*a*) See Braithwaite Pr. Clerk of R. & W.

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Changing venue.

In a bill relating to property in Toronto, there not being sufficient time to get the cause down for hearing at the next ensuing Toronto Sittings, the venue was laid at Whitby with a view to bring the case to a hearing at the ensuing Sittings there; after answers the defendants moved to change the venue to Toronto, and filed affidavits stating that some of their witnesses were out of the jurisdiction, and the evidence of such witnesses could not be procured in time: that others were resident in Toronto engaged on defendants' railway there, and their attendance at Whitby would interfere with the working of the railway at Toronto. The Court granted the motion on the defendants' undertaking to abide by such order as the Court might make as to any damages which the delay caused by change of venue would occasion.

[November 14, 1870.]

Mr. *S. H. Blake* and Mr. *Cassells*, for the defendants, who moved.

Mr. *Crooks*, Q.C. and Mr. *Rae*, contra.

Argument.

On the part of the plaintiff it was urged that on the motion for giving time to answer after the overruling of the demurrer the same consideration now relied on were brought before Mr. V. C. *Strong*, as also they were on the motion to stay proceedings before the Chancellor, and the defendants had the benefit of all such considerations as were in their favour, and they could not make a new case on a motion to change the venue.

Mr. *Crooks* pointed out that the plaintiff was a tenant of the Corporation of Toronto, that the provisions in his lease were onerous; and to enable him to comply with his covenants the nuisance complained of should be abated, that he might bring the property into market. Further: the Acts relating to the Esplanade define very clearly the rights of the parties interested in the use of

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the road and the right of way over it; the Grand Trunk Railway had certain privileges about which no doubt could exist, but they are using the road in a way unauthorized; the defendants in effect admit this in their answer, there is therefore no necessity for witnesses or evidence; such evidence as is required will be almost exclusively documentary, and it can be produced at one place as well as at another. The application is evidently to gain time, whilst the plaintiff is entitled to speedy relief; the nature of the case as shewn by the pleadings entitles him to such speedy relief, and the Court will not so exercise its discretion as to delay justice. (*a*). The question is one of discretion, the question of right has already been decided on the demurrer; the case differs from one where mere money interests are concerned; the plaintiff if damnified cannot well be compensated and placed in *statu quo*; and the delay here if granted will injure him. As to the question of postponing the hearing, it is a very broad assumption that Mr. *Brydges* is a necessary witness. Mr. *Brydges* as manager of the Company can prove no more than can be proved by any one acquainted with the premises, the station master for instance; to support their position, it should be shewn that Mr. *Brydges* is the only witness as to the fact sought to be proved. An application for a stay of proceedings as asked here is only granted in furtherance of justice, and they have not shewn such a case here. The evidence of Mr. *Brydges* is not material, but were it otherwise, it is not shewn that he did not know when he left the jurisdiction that his evidence would be required; and plaintiff should not be allowed to be prejudiced by his absence,—see *Soloman* v. *Howard* (*b*),—and he further urged that time had already been asked on the other motions and refused, that delay had been caused by defendant's abortive demurrer; but for this, Mr.

Argument.

(*a*) Lush Pr. 414.

(*b*) 12 C. B. 463.

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Brydges could have been examined before he left; the defendants had precluded themselves from now asking time. The same remarks apply to the absence of Mr. *Shanley:* the other side should have shewn that he was permanently a resident of the United States.

Mr. *Rae* followed on the same side contending that the question of the balance of convenience had already been disposed of in the judgment of the Chancellor on the motion to stay proceedings, which he read.

Mr. *S. H. Blake*, in reply. There was no application before the Chancellor to change the venue: the judgment sufficiently shews this. As to the question before *Strong*, V.C, the minutes of the order shew what it was, —no question was raised as to changing venue. The Chancellor's judgment does not dispose of the question; the utmost that can be said is, that it expresses a view that it would be judicious to go down, where the plaintiff is entitled to go, leaving the defendants to apply to change the venue if they were so entitled, as it is contended they are.

Argument.

The minutes of the order made by *Strong*, V. C., as drawn up in the handwriting of plaintiff's solicitor, contain the word "Whitby" as the place of hearing, but the Registrar struck out the word, leaving it open to defendant to apply to change the venue. There was nothing to bar defendant making such application; the judgment of the Chancellor and Vice Chancellor on the former motions were no bar; the Judges decided only the questions brought before them; change of venue was not one of them. In the case cited in 12 C. B. an undertaking had been given to go to trial; such is not the case here. As to the merits, and the justice of the case, the property spoken of had been bought by the plaintiff on speculation, well knowing the position of it, and the fact of the existence of the station and rails

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where they were; and he must now take his chance; the justice is on the other side; all the hardships would be on the defendants, and the plaintiff is not in a position to urge hardship. The witnesses required are men engaged hourly in attending to public railway duties, the station master, switchmen, &c., it would be the greatest hardships on such men to take them to Whitby, and would be attended with damage to the public. The practice contended for as laid down by Mr. *Lush* had not been followed here: *Chard* v. *Meyers*, *Mallory* v. *Mallory*, *Fisken* v. *Smith*, followed *Ledyard* v. *McLean*, and not the practice in *Lush* or *Archbold*. In all our cases here, convenience has been made the test, and here the preponderance of convenience is greatly in favour of Toronto; all the papers and documents, and the officials of the Corporation of Toronto are here; considering when plaintiff filed his bill, and all attendant circumstances, it would amount almost to a denial of justice to refuse a change of venue.

Judgment.

MOWAT, V. C.—Defendants undertaking forthwith to abide by such order as the Court may make as to any damages which the plaintiff may sustain by reason of the delay in hearing the cause, the venue is changed to Toronto—defendants to pay plaintiff's costs of the application. The defendants' solicitor swears positively, amongst other things, that Mr. *Shanley* is a material and necessary witness for the defendants; that he resides in Massachusetts; that his evidence cannot be had in this cause for the Whitby Sittings this fall; that the defendants cannot safely proceed to a hearing without his evidence; that the defendants require as witnesses "*all* the switchmen and yardmen of the defendants at the Union Station, Toronto;" that *all* these are material and necessary witnesses for the defendants; that if they are obliged to go to Whitby, their "absence" will interfere very much with the working and managing

of the said railway at Toronto; and that the application to change the venue and postpone the hearing is made *bona fide*, and not for the purpose of delay. For the plaintiff it was argued that there is no issue on the pleadings on which the testimony of these witnesses can be material. But I cannot say that. I refer particularly to the 20th, 21st, and 22nd paragraphs of the bill, and the 6th paragraph of the answer. Mr. *Bell* has not been cross-examined, and I think that I must accept his statements as correct. Considering, however, the facts sworn to on the part of the plaintiff, and what has already occurred in the suit, I think the order desired should only be made on the terms which I have mentioned. Should the defendants not accept these terms, the motion must be refused with costs.

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KLINE v. KLINE.

Administration decree—Accounts thereunder—Creditor claiming under a partnership with testator.

Under an administration decree a creditor claimed by virtue of a partnership with the testator. It was objected that the establishment of his claims involved taking the partnership accounts, and they could not be gone into under the decree.

The Master held that the claim could be entertained, and directed that a third party to the partnership who was a stranger to the suit should be served with an office-copy decree, and notified of the proceedings to take the partnership accounts.

[November 28, 1870.]

Statement.

Anthony Kline, the defendant, claimed to be a creditor of the testator by reason of a co-partnership existing between them before the testator's death, and also by reason of a co-partnership between the deceased, and the father of the said *Anthony Kline* of whom he was the sole administrator. A decree had been made in the suit which contained the usual clauses in administra-

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tor's orders, and among others that an account be taken of the testator's personal estate, and also an account of the testator's debts. On the part of the defendant it was objected that this claim could not be entertained in this suit, as the fact of partnership would have to be established against the infant defendant, and that the partnership account could not be taken in this suit and under this order of reference, and as there was a third party, a stranger to the suit, who was one of the members of the alleged co-partnership who was a necessary party to the taking of such accounts, but who was not before the Court and could not be brought in, in the Master's office.

Mr. McCarthy, in support of the claim.

Mr. Bain, for the plaintiff.

Judgment.

MR. BOYD, MASTER IN ORDINARY.—Upon a consideration of the General Orders, and of the decided cases, I come to the conclusion that this claim can be entertained, and must be disposed of in this suit and under this reference. I refer to General Orders as consolidated: Nos. 223, 224; 475, 482; 219, 220. If after the death of a partner the survivor pays more than his share of the debts of the whole firm, he is a creditor of the estate for what may be due from the deceased partner upon taking the partnership accounts, and he may as creditor institute a suit for the administration of such estate: (*a*), *Robinson* v. *Alexander* (*b*), see *Rawlings* v. *Lambert* (*c*); and so he could obtain the usual admistration order as a creditor; in which case the fact of the partnership must be established and the partnership accounts must be taken in the Master's office. *Lindley* says further, "It seems

(*a*) Lindley *ii.* 1034. (*b*) 2 Cl. & Fin. 717.
(*c*) 1 J. & H. 468.

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that under an ordinary decree for the administration of the estates of a deceased partner, the partnership accounts will not be gone into, unless the decree specially directs some inquiry to be made with reference to the share of the deceased, *but it is difficult to see how any accounts of his personal estate can be taken without such an inquiry;* and it has been decided more than once, that if the surviving partners seek to obtain payment of the balance from the estate of the deceased on the partnership accounts, these accounts must be taken, although no special direction as to them may be inserted in the decree (*a*). In the present case *Anthony Kline* claims a right of retainer in respect of just such a balance. In *Woolley* v. *Gordon* (*b*), the Master of the Rolls says, "The Masters have made a rule not to take an account of a partnership unless they are particularly directed to take the partnership accounts. Yet they are hardly warranted in making that rule, the order being to take all accounts"! and he referred it to the Master to enquire whether the petitioner was a partner with the testator, and if so, then to take the accounts of the partnership. See also the case cited on the argument of *Paynter* v. *Houston* (*c*). Now by our General Order upon all references to take accounts, the Master is "to *inquire*, *adjudge*, and report as to *all* matters as *fully* as if the same were *specially* referred." It is not questioned here, but that the Court would have power to make such an order at *Anthony Kline's* instance in this suit, as was made by the Master of the Rolls in the case in *Tamlyn;* if so, the General Orders are tantamount to such a special order, and the question necessary to be determined upon his claim to be a creditor of the estate must be worked out in the Master's office under the present decree. The only remaining point is as to the third partner, who is a stranger to the suit. There

Judgment.

(*a*) Lindley ii. 1060. (*b*) Taml. 11, (1829.)
(*c*) 3 Mer. 297.

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is no doubt he is interested in the taking of the partnership accounts, and should be allowed an opportunity of being present thereat. In case of a bill filed to take such accounts, he would be a proper party: *Thorpe* v. *Jackson* (*a*); but upon an administration proceeding not by bill it does not appear that he need be an original defendant. In *Hills* v. *McRae* (*b*), a claim was filed by the creditors of a partnership against the estate of a deceased partner, the surviving partner not being made a defendant, and the Vice Chancellor inserted a direction in the order to the effect that the surviving partner should be summoned to attend before the Master in prosecuting the inquiry as to the debts of the firm. This would not make him a party to the suit, but would put him in a position similar to that of persons served with office copy decree under General Order 60, as explained in *English* v. *English* (*c*).

Judgment.

That inasmuch as the Vice Chancellor in *Rolph* v. *Upper Canada Building Society* (*d*), considers that 6th General Order of June 1853, part of which is consolidated in General Order 60, applies to those cases wherein the parties dispensed with have or may be presumed to have the same interest as the plaintiff, and inasmuch as he holds that the 16th section of the 42nd Order (consolidated as Order 244), is applicable to cases where no direct relief is sought against the parties to be added, *or where the object is merely that they may be bound by the proceedings in a manner analogous to what is provided for by the 6th Order of 3rd June 53*: I shall direct an office-copy decree under Orders 244 and 245, to be served upon the co-partner who is a stranger to the suit, and that it be specially endorsed so as to inform him why he is served therewith, and the time when the partnership accounts will be gone into.

(*a*) 2 Y. & C. Exch. 553.
(*b*) 9 Ha. 297.
(*c*) 12 Gr. 445.
(*d*) 11 Gr. 278, 279.

1870.

DEWAR v. ORR.

Counsel fee—Where taxable.

A counsel fee on hearing is not taxable until the cause has been set down for hearing, and notice of hearing given.

[December, 1870.]

On an appeal from a Master's report, one of the grounds taken was that the Master had allowed the defendants a counsel fee of $15 on the allegation that a brief had been given to counsel immediately after the filing of replication. The bill had been dismissed before notice of hearing was given.

Mr. *Hamilton*, for appellants, cited *Ayckbourn's* Chy. Prac. (*a*), *Re Pender* (*b*), *Friend* v. *Solly* (*c*).

Mr. *Wells*, contra, said that Mr. *Hemmings*, the late Taxing Master, had been in the habit of allowing a counsel fee under such circumstances.

STRONG, V. C., allowed the appeal on this ground, saying that the English practice, and that in our Common Law Courts in similar cases, should be followed; and no brief or counsel fee allowed until after the cause is set down, and notice of hearing given. Judgment.

FRIETSCH v. WINKLER.

If a cause irregularly set down for hearing by the plaintiff is struck out upon defendant's motion in Chambers with costs, this entitles the defendant to tax costs of the application only and not the costs of preparing for hearing.

[December, 1870.]

This cause had been set down and struck out of the list for hearing, as reported *ante* page 109. On carry-

(*a*) Page 195, edition of 1866. (*b*) 10 Beav. 390.
(*c*) 10 Beav. 329.

1870. ing in the defendant's costs for taxation, the bill contained charges for preparing for hearing, &c.

Fristech v. Winkler.

Mr. *A. Hoskin*, in support of the bill of costs.

Mr. *C. Moss*, contra.

J. A. BOYD, MASTER IN ORDINARY.—When notice of trial is countermanded at law, or a cause set down for hearing in Chancery is struck out at the instance of the plaintiff just before the trial or hearing, there is a very material difference in the taxable costs, as compared with what will be taxable when the notice of trial is set aside or cause struck out at the defendant's instance. Costs are granted in both cases: but in the case of a defendant moving and obtaining such order they will be in general restricted to costs of the application. When defendant at law moves to set aside a notice of trial as irregular, he will, if successful, get the costs of the application, and no more: *Skelsey* v. *Manning* (*a*), *Hogg* v. *Turner* (*b*). But if the plaintiff discontinues just before the trial, the defendant will be allowed his costs of preparing for trial and instructing counsel: *Cheshire Co.* v. *Mumford* (*c*); and if an appellant withdraws an appeal, he will have to pay the same costs as if the appeal were dismissed: *Attorney-General* v. *Halifax* (*d*). If an irregular notice of trial at law is given, the defendant may abstain from appearing at Nisi Prius, and afterwards move against the verdict in term, and, if successful, he will have the verdict set aside with the costs of his application, and no more: *Cotton* v. *Thompson* (*e*).

Judgment.

The practice now appears to be settled in Chancery, that if the notice of hearing or the setting down of a cause is irregular, the defendant's course is to move

(*a*) 8 U. C. L. J. 166.
(*b*) 2 U. C. L. J., N. S., 267.
(*c*) 2 C. L. R. 746.
(*d*) 18 W. R. 153.
(*e*) 5 Jur. 270.

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against the proceedings in Chambers, and not to wait till the matter is brought on in Court. If the objection is not taken by motion in Chambers, no costs will be given at the hearing, even though the objection succeeds and the cause be struck out: *Stevenson* v. *Hodder* (*a*); as compared with the earlier cases of *Caroll* v. *McDougall* (*b*), and *Armstrong* v. *Cayley* (*c*). This is precisely the practice as at law upon applications to set aside notice of trial for irregularity, and why should the costs be other or greater than at law in successful applications of such a kind? Such an application at law is favored because it prevents the incurring of further costs at the trial, which will prove unnecessary. It is only when notice of trial or hearing is properly given that a defendant should prepare himself for trial. If the notice is irregular, he should decide whether to waive the irregularity or move against it. If he moves against it, then he should not prepare for trial, unless as a measure of precaution and for the safety of his client: *Hastings* v. *Champion* (*d*). But such costs, taxable though they would probably be between him and his client, should not be taxed against the opposite party, if the notion for irregularity succeeds (*e*).

Judgment.

In the present case there is another objection to the costs of preparing for the hearing being now taxed, which is this: a portion if not all of these costs were not incurred when the motion was made before the Secretary; and no new facts can be brought before the Court on an appeal: *Bank Montreal* v. *Wilson* (*f*). The order on appeal relates to the date of the first order, and rectifies it by making such an order as should then have been made. So that even if the Secretary's order had expressly given the costs of preparing for hearing, nothing could have been taxed under such a direction, as no such costs were then incurred.

(*a*) 15 Gr. 542. (*b*) *Ib.* 329. (*c*) 13 Gr. 558.
(*d*) 6 U. C. O. S. 29. (*e*) See Con. Ord. 306, 308. (*f*) 2 Cham. R. 117.

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The terms in the present order as to costs, *i. e.*, discharging the Secretary's order, disallowing the amendments, and striking out the cause from the list of causes for hearing at Goderich with costs, are sufficiently satisfied by taxing the defendant's costs of this application, and costs of appeal from the Secretary's decision: *Baring* v. *Harris* (*a*). The defendant might have made a special application upon the argument of the appeal for the allowance of the costs of preparing for the hearing, or have had them made costs in the cause.

REPORTER'S NOTE.—The above case has since been appealed, and now stands for judgment.

IN RE RICHARDSON.

Master's Office—Taxation.

Practice defined as to the manner in which the Master will tax solicitor's costs for professional services rendered in the sale of lands and collection and transmission of the purchase money.

[December 15, 1870.]

Statement.

The points appearing in the judgment arose before the Master in Ordinary on the taxation of a solicitor's bill of costs, an order for which taxation had been obtained *ex parte*. The circumstances, as far as they relate to the points decided, sufficiently appear in the arguments and judgment.

Mr. *Smart*, for *Lattey*, the clients contesting the bill, objected first, that the Solicitor was not entitled to charge a commission: *O'Brien* v. *Lewis* (*b*), *Re Hobbs* (*c*). He contended that if a bill contained taxable items, the Court would consider that this formed the remuneration to the solicitor, and disallow commission. In the present case the client had not agreed to pay commission;

(*a*) 10 Jur. N. S. 1190.
(*b*) 11 W. R. 318.
(*c*) W. N. 67, p. 116.

secondly, as to the quantum of commission charged, he submitted it was excessive: five per cent. is charged on effecting a sale on the price agreed to be paid—and again two-and-a-half per cent. on collection of the purchase money, and two-and-a-half on money remitted to England. The evidence shews that the usual commission varies from two-and-a-half per cent. to five per cent. on sales of real estate, and that such per centage covers sale, collection, and remitting money: five per cent. was allowed in a case for the collection of rents and personal claims, &c. In *Re Hardy* (*a*), before the Master, five per cent. was allowed on the collection of sums in the Division Court. In *St. George* v. *Draper* (*b*), where a commission of two-and-a-half per cent. was allowed on the sale of lands, there were no costs charged besides in connection with the land.

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In re v. Richardson.

Mr. *Cattanach*, for *Richardson*. As to the propriety of the charge for commission, urged that the case differed from the simple employment of a solicitor by a client—the power-of-attorney cast upon him a trust—there is no distinction between a solicitor trustee and any other person as to the right to remuneration; *Re Hobbs* would not apply to a case of a solicitor trustee. In this case a burden is cast on the solicitor other than that of mere professional relationship, and for this he should be paid as if he was not a solicitor.

Argument.

Simpson v. *Hutchinson* was a case in which compensation was allowed to a solicitor under a trust deed. The practice here is regulated by what is the custom, and the evidence has established the view contended for as to the charging commission: as to the rate of commission he contended the charge was reasonable, and pointed out that the services were extraordinary, and the prices obtained high.

(*a*) Q. B. 66. (*b*) Q. B., Feb. 1862.

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Mr. *Smart*, in reply, cited *McLennan* v. *Heward* (*a*), *Morgan & Davey* (*b*).

J. A. BOYD, MASTER IN ORDINARY.—In this case I have not to consider whether the bill of costs is taxable or not. An order referring it as a whole has been made, which both parties acquiesce in, and it is laid down that the question whether a bill is taxable or not is for the judge to decide to whom is made the application to refer the bill: *Re Johnson* (*c*), *Re Keys* (*d*). (See *Cocks* v. *Harman* (*e*), apparently overruled by *Re Aitkin* (*f*), *Re* ——— (*g*).) I think, moreover, that all the services rendered in this case were professional services within the meaning of the Attorneys' Act, and the decisions thereupon. It consists of business in which the solicitor was employed, according to my reading of the evidence and correspondence, because he was a solicitor, or in which it may fairly be inferred he would not have been employed if he had not been a solicitor, or if the relation of solicitor and client had not subsisted between him and his employer: *Allen* v. *Aldridge* (*h*). The employment here was professional just as much as in *Re O'Donohue* (*i*), where *Draper*, C. J., ordered an attorney's bill of costs to be delivered for professional services rendered in reference to the investigation of title to and purchase of certain property wherein the attorney had received and paid out money for the client, and wherein, as appears from the judgment, he had also invested money for the client. In *Pulling's* Law of Attorneys, pp. 4, 5, it is said: "It comes within the legitimate and peculiar province of attorneys and solicitors at the present day to draw and prepare agreements, wills, deeds, settlements, securities,

Judgment.

(*a*) 9 Grant, 193.
(*b*) P. 314.
(*c*) 26 L. T. 108, Crompton, J.
(*d*) 18 C. P. 281, 287.
(*e*) 6 East. 404.
(*f*) 4 B. & Ald. 47.
(*g*) 11 Jur. 396.
(*h*) 5 Beav. 405.
(*i*) 4 P. R. 266.

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and documents, and also to conduct negotiations, procure and solicit loans, superintend the management of and the letting, purchasing and selling of property, estates and annuities, to collect and receive rents, debts, &c., invest and dispose of moneys, and find sufficient securities for such purposes, &c., &c., thus acting generally in the distinct characters of *procurators, negotiators, conveyancers, confidential advisers, agents, stewards, receivers, collectors,* and *scriveners.*" (*a*) I do not think that the power of attorney given to Mr. *Richardson* operates to change his character as a solicitor into that of a trustee. If, indeed, it were so, the conclusions I should arrive at would be very different from those now set forth (*b*). But in this case, Mr. *Richardson* being a public solicitor, became by the power of attorney the *private* solicitor of his constituent, and occupied a different position from that of his trustee (*c*). The relationship is rather that of principal and agent, in which case there is no disability in the agent to recover full costs: *Joliffe* v. *Hector* (*d*), *White* v. *Lincoln* (*e*). I think it is competent for me to deal with all the items contained in the present bill, including the charges for commission on selling land and on collecting and remitting the proceeds of such sales to England. A case in the Irish Rolls (1854) appears to lay down the rule that when a bill is taxable, and is referred to the Master, he is thereby empowered to deal with all the items in the bill, whether the services be strictly professional or rendered only as an ordinary agent: *Re Collis* (*f*). This is contrary to what was held in Chambers by *McLean*, J., in *Re J. R. Jones* (*g*), but this Irish case goes to an extent more than sufficient to warrant the taxation

Judgment.

(*a*) See also Peters v. Weller, 30 U. C. R. 4.
(*b*) See Harbin v. Darby, 28 B. 325.
(*c*) See Hobson v. Cook, 1 Jur. N. S. 864.
(*d*) 12 Sim. 398.
(*e*) 8 Ves. 363.
(*f*) 23 L. T. R. 40.
(*g*) 3 U. C. L. 167.

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of the whole bill in the present reference (*a*). Now in regard to the greater part of the charges in this bill for commission on the sale of lands and the collection and transmission of moneys, and charges for conveyancing, the law is well laid down in *Poucher* v. *Norman* (*b*): "The general rule is that any man who bestows his labour for another, has a right of action to recover a compensation for that labour. There are two exceptions to that rule, viz., physicians and barristers. The law supposes them to act with a view to an honorary reward. In the other degrees of those professions parties may recover for their services. An attorney may recover for conveyancing. So a surgeon may recover for attendance. Then if that be so, there is nothing to take a conveyancer, who is not a barrister, out of the general rule of law by which a man who bestows his labour for the benefit of another has a right of action for a reasonable compensation for his labour." (*c*) As to the right of conveyancers in this country to recover for their services (*d*). Even in the case of barristers where there is an express and actual contract and a distinct promise to pay for their professional services, such services being unconnected with advocacy in litigation, then there is a legal title to remuneration: *Egan* v. *Guardians Kensington Union* (*e*), *Veitch* v. *Russell* (*f*), *Higgins* v. *Gordon* (*g*), *Kennedy* v. *Brown* (*h*), *Hobart* v. *Butler* (*i*). In the present case no remuneration is provided for in the power of attorney, but in a letter referring thereto, of date the 7th October, 1868, written to Mr. *Richardson*, it is said, on behalf of the

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(*a*) See also Luxmore v. Lethbridge, 5 B. & Ald. 898.

(*b*) 3 B. & C. 744.

(*c*) S. c. 5 D. & Ry. 648. See Taylor v. Crowland Gas Company, 2 C. L. R. 1247.

(*d*) See Re Eccles, 5 U. C. L. J. 279; s. c. 6 U. C. L. J. 59; Re Lemon, 8 U. C. L. J. 185; and Re Glass, 9 U. C. L. J. 111.

(*e*) 3 Q. B. p. 935, n. (*f*) 3 Q. B. 936. (*g*) Ib. 474.

(*h*) 18 C. B. N. S. 732. (*i*) 9 Ir. C. L. R. at p. 163.

client, "*with regard to your remuneration, we presume you will make the usual professional charges.*" The contract, then, between the parties, was that the solicitor, who is called a barrister in the power of attorney, was not to act gratuitously; he was to be paid for his services. But paid upon what footing? There is no tariff of costs regulating the charges for such business, nor is there any statute applicable thereto. In the absence of any specific contract, the general custom and practice of solicitors in such cases is to be the guide for the compensation allowed, if any such custom and practice exists; if not, the value of the services rendered is to be estimated upon a *quantum meruit*. I think, however, the usage in this country, as well as in England, has been that an agent, whether solicitor or not, instructed to deal with another's real estate, to rent it or sell it, to collect the proceeds of sale, and remit the money, shall be paid for this work by means of a commission upon the prices obtained and the moneys realized and remitted.

Judgment.

Thus in *Wolf* v *Findlay* (*a*), it appears that money was collected in India under a power of attorney and remitted to England. The amount was about £2000 on which something over £30 was charged as commission, this being at a rate of 1½ per cent. So in *Baker* v. *Harrison* (*b*), the defendant, a land valuer, was engaged to sell the plaintiff's lands at a certain price for which he was to receive £1 per cent. on the purchase money by way of commission. See also *Elder* v. *Boyle* (*c*). So in *Murray* v. *Currie* (*d*), where it was shewn that an agent to sell real estate was entitled to a commission of 2 per cent. on having found a purchaser. And in *Hayes* v. *Tindell* (*e*), an agent for renting houses was paid a 5 per cent. commission on the rent.

(*a*) 6 Ha. 66.
(*b*) 2 Coll. C. C. 546.
(*c*) 4 C. B. 635.
(*d*) 7 C. & P. 584.
(*e*) 4 L. T. N. S. 403.

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So, also, I find in a convention tariff settled by the practitioners at Toronto provisions to this effect:—"Commission on collecting and paying over moneys obtained without suit to clients in Upper Canada for the first £100 per cent. £2 10s. 0d. For every additional £100 and under, £1 0s. 0d. To clients out of Upper Canada in all cases for £100 and under per cent. £3 10s. 0d. For every additional £100 and under per cent. £1 0s. 0d." And in a like tariff promulgated by the Hamilton bar there is contained the following scale of charges:—"Commission on negotiating the purchase or sale of lands (exclusive of any charges for conveyancing, opinion, &c., but including the necessary attendances in the course of the negotiation) per cent. 50s. Per centage on collection and transmission of money to correspondents in Upper Canada out of the city, 50s. To correspondents out of Upper Canada, 100s." The principle of compensation being claimable upon this footing by solicitors is recognized in several Acts of Parliament: for instance by 12 Anne. St. 2 ch. 16, sec. 2, it is provided that no solicitor, scrivener, or broker shall take above 5s. for soliciting and procuring the loan of £100 for a year; and in 53 Geo. III. ch. 141, sec. 9, solicitors, scriveners, and brokers were allowed to receive as a gratuity or reward for soliciting and procuring a loan under such act not more than 10s. for every £100. A solicitor under these acts might have made his charges as for brokerage: *Merrifield* on Attorneys, p. 121. And in *Pulling* on Attorneys, p. 198, it is said: "The chief personal right of attorneys and solicitors as that of agents and professional persons in general is that of receiving remuneration for their services and reimbursement for their costs and expenses incurred for their clients and employees." And see pp. 200, 201, 202, 204: "In some instances the rates of renumeration allowed to attorneys have been settled by Statute Law *e. g.* for the negotiation of loans," &c. *Ib.* It is

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by a commission that brokers and others, occupying a position analogous to that of a solicitor dealing with real estate, as in the present case, are remunerated for their services, and the mode by which that is to be ascertained is thus laid down by *Alderson*, B., in *Brown* v. *Navin* (*a*), in his charge to the jury: "I do not think the amount of the trouble in each case is to be a criterion, because if it were, the payment would not be by a per centage, which is what both parties contend for. If you think there is no practice on the subject you will find what is the amount that you think a reasonable remuneration to the broker in this case for his services." See also *Roberts* v. *Jackson* (*b*), *Hill* v. *Kitching* (*c*), *Re Page* (*No.* 3) (*d*), *Davenport* v. *Parrot* (*e*), *Re Bradlaugh* (*f*), *Hall* v. *Gurney* (*g*).

Judgment.

If then in the absence of any agreement as to the mode of payment and in the absence of a certain and authorized tariff of costs, there is a well defined usage in the mode of remunerating solicitors for professional work done outside of the Courts of the mixed character adverted to by Mr. *Pulling* in the passage cited, such a customary mode of payment should be followed by the Master upon taxation. This is merely carrying out the ordinary principle of law, that where there is a recognized professional usage, and in the absence of express agreement to the contrary, the dealings between solicitor and client must be treated as governed by such usage. That a matter of legal usage respecting fees will be regarded by the Court, appears from what is said in *Hobart* v. *Butler* (*h*), the cases cited by Mr. *Smart*, during the argument, it appears that the principle of ascertaining the value of an attorney's services for miscellaneous work by means of a commission has been recognized and acted on by the taxing officers in the

(*a*) 9 C. & P. 205. (*b*) 2 Stark 225. (*c*) 3 C. B. 299.
(*d*) 32 Beav. 487. (*e*) 14 Sim. 275. (*f*) W. N. 67, p. 12.
(*g*) 2 C. & K. 644. (*h*) 9 Ir. C. L. R. at p. 171.

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Common Law Courts, in cases where there was no tariff applicable thereto: see *St. George* v. *Draper* (*a*), where a commission of 2½ per cent. was allowed on a sale of lands, and *Re Hardy* (*b*), where 5 per cent. was allowed on the collection of a great number of small sums in the Division Court. There are besides two reported cases which I have found that seem to support the views now advanced: *De Woolfe* v. ——— (*c*), in which the applicants moved for a rule upon the attorney to shew cause why he should not render an account of moneys received and pay the same over. It appeared that the clients lived in America, and had sent a power of attorney to the respondent, describing him as counsellor and attorney, whereby he was authorized to prosecute an appeal in the English Prize Court. In consequence of this the attorney employed a Proctor, and subsequently received upwards of £3000, of which only a small part had been paid over. The attorney stated on affidavit that he was not employed in his professional character but as an agent, the same as many merchants were in relation to prize causes; that the Proctor had received all the fees in the suit, and that he the attorney as usual with other similar agents charged only a certain per centage on the sum recovered. And it was contended by the Solicitor General on the attorney's behalf that the Court would not interfere in a summary manner to compel an account and payment which were more properly the subject of a bill in equity or an action. The matter was determined by *Bayley*, J., who ordered the attorney to bring £3000 into Court and render an account of moneys received and disbursed to the Master, who should direct whether any and what sum should be paid by the attorney, [that is as I understand it whether the attorney should be allowed on the score of compensation to retain any of the moneys in his hands exceeding the £3000 ordered into Court]. And he

Judgment.

(*a*) Feb. 1862, Q. B. (*b*) 1866, Q. B. (*c*) 2 Chitt. 68.

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further observed: "That in this case the power of attorney described the attorney as counsellor and attorney, and it was otherwise manifest that the employers contemplated the party's professional character and it was therefore proper, especially as they were foreigners that summary relief should be afforded to them and that they should not be driven to file a bill in equity." The other case in our own Courts: *Doe ex dem Fraser* v. *Eaglesum* (*a*), where, after payment of an attorney's bill, the Court directed a taxation on account of one item which the Court thought an excessive charge. It was a charge of two per cent. on the amount of £600 recovered in an action upon a mortgage; and it was sworn and not denied that the money had never passed through the attorney's hands, and so this charge for receiving and paying it over was without foundation.

Judgment.

It is objected here, on the authority of *In Re Hobbs and Seal*, that the charges for commission should be disallowed *in toto*. This case is to be found in the W. N. for 1869, at p. 116; it is very meagrely noted and is nowhere reported. The facts as stated are in substance these: a physician arranged for the sale of his practice to be effected by the solicitors on the following terms—Price to be not less than £350: any sum over that and under £400 to go to solicitors as remuneration: any sum over £400 to be divided between the physician and the solicitors. A sale was made at £500 and a sum of £50 paid to solicitors by physician in pursuance of the agreement. The sale was completed by deeds which the solicitors prepared and for which they sent in a bill of costs. On taxation of these costs, the client brought in the £50 payment by way of surcharge, which was allowed by the taxing Master on the ground that a solicitor cannot bargain for any remuneration beyond his costs. Upon application to review the taxation it was urged that the pay-

(*a*) 5 O. S. 77.

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ment wasmade to solicitors personally under a distinct agreement anterior to the relationship of solicitor and client; but the Master of the Rolls without hearing the other side, refused the application. This case then it appears was really one wherein before costs were incurred an agreement was made for payment by a bulk sum. The law upon this point was well settled before this case, and it was probably not reported because of its merely confirming previous decisions, the effect of which may be thus stated: any agreement between solicitor and client for the taking of a fixed sum for business thereafter to be done is not binding on the client who can apply for a bill of costs and for a reference of it to taxation in the same way as if no such agreement had been entered into: *Philby* v. *Hazle* (*a*), *Re Newman* (*b*). If any fixed sum has been agreed upon, that may be a fact for the Master to regard in arriving at his conclusions, but it cannot be allowed to control his judgment or interfere with his discretion: *Drax* v. *Scroope* (*c*), *Smith* v. *Dimes* (*d*), *Re Eccles* (*e*). In other words a solicitor cannot bargain with his client to get a better benefit than he would get by the costs or renumeration which by law he is entitled to charge: *Pince* v. *Beattie* (*f*), *O'Brien* v. *Lewis* (*g*). Now the charge made in *Re Hobbs* was at a most exorbitant rate of commission and the decision in effect was that the solicitor must bring in his bill for services connected with the sale and have it taxed by the Master. It cannot be argued that he was entitled to nothing except for the conveyancing; that was work quite distinct, and performed in a character quite different, from the agency services rendered in effecting a sale of the medical practice. The rule is that when there is a tariff of costs covering any given service, the attorney cannot as to such service bargain

Judgment

(*a*) 8 C. B. N. S. 647. (*b*) 30 Beav. 196. (*c*) 2 B. & Ad. 581. (*d*) 4 Ex. 40. (*e*) 5 U. C. L. J. 279. (*f*) 32 L. J. Chy. 734; s.c. 9 L. T. N. S. 315. (*g*) 4 Giff. 221

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for compensation *ultra*: *Strange* v. *Brennan* (*a*). Even under the statutes relating to loans previously mentioned, the attorney could charge for his writings in addition to the percentage by way of brokerage: *R.* v. *Gillham* (*b*). And so under those acts, a person not an attorney could not stipulate for anything beyond the statutory commission: *Pryce* v. *Wilkinson* (*c*).

In truth, the Master in taxing the items for commission is in the same position and experiences the same difficulties as in taxing the conveyancing charges which it is admitted are taxable. The rule in such cases, as laid down by *Pollock*, C. B., in *Smith* v. *Dimes* (*d*), is this: "When the bill is for conveyancing and business not done in Court, the Master must ascertain the remuneration as well as he can, according to the contract between the parties, express or implied." So, in *Re Osborne* (*e*), a bill of charges for services by solicitors who acted as electioneering agents, was held taxable, though the statute relating to elections provided no tariff, and though the Court recognized the fact that it might be more desirable to have the *quantum meruit* as to professional services of such a character determined by a jury (*f*). The Master will have to proceed in the same manner as in a case where it is impossible for the solicitor to give a detailed bill of costs, a predicament thus referred to in *Morgan* v. *Higgins* (*g*): "If it appears that the solicitor, from some accident, or from some circumstance that may be accounted for in a satisfactory way, is deprived of the means of delivering full bills of costs, as from having lost his books and papers, or from having acceded to the desire of his client that he should not keep any detailed accounts, but that he should be remunerated on the footing of a gross sum:

Judgment.

(*a*) 15 Sim. 346. (*b*) 5 T. R. 265. (*c*) 2 Bing. 470.
(*d*) 4 Exch. 41. (*e*) 25 Beav. 353. (*f*) Cf. with this case, Re Oliver, W. N. 1867, p. 27. (*g*) 1 Giff. 281.

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then in such a case the Taxing Master requires the best evidence that can be given; affidavits or other evidence of the nature of the work done, and all other circumstances to shew what sum would be proper to be allowed."

There are several lump sums charged in the bill, as to which Mr. *Richardson* has given evidence of what really did occur in respect to them, and how they are made up, as was held proper in *Re Tilleard* (*a*). As a general rule, all disbursements properly and actually made by the solicitor should be allowed according to the holding in *Re Page* (*b*), and I think all the disbursements in the present bill are proper, and payment of the money has been proved.

Judgment.

The first item of $10 is reasonable for the amount and character of the work done. Of the two letters, only one should be allowed at 10*s*., as special; the other at 2*s*. 6*d*.

For the power of attorney, including affidavit and certificate as a draft, $7 should be allowed; if prepared in duplicate, for each engrossment, $3.

The charge for clean copy is proper as it stands.

All attendances and journeys charged after receipt of the power of attorney should be taxed off, because, these being incidental to his employment as agent, he is not entitled to charge separately for, but only to have included in the commission I intend to allow. This is the rule as laid down by *Rolfe*, B., in *Marshall* v. *Parsons* (*c*).

The conveyancing charges in respect of deeds are reasonable.

(*a*) 32 Beav. 481. (*b*) 32 Beav. (*c*) 9 C. & P. 656.

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As to the interest charged on the $68.20, that should not be allowed on the portion, viz., $20 which is charged as costs. Upon the sums disbursed interest should be allowed as consented to by Mr. *Smart*: *Lyddon* v. *Moss* (*a*). This charge of $20 is not unreasonable, and should be taxed.

Then, as to the commission; having regard to the usage of the profession and the evidence given in this case; the fact that an agency to sell is distinct from an agency to receive the purchase money: *Ingram* v. *Joliffe* (*b*), *Ireland* v. *Thompson* (*c*), and that an agency to receive down, payments is distinct from an agency to collect mortgages for unpaid purchase money: *Greenwood* v. *Commercial Bank* (*d*), having regard to the number of lots to be sold, the exertions made by the attorney, the time and trouble involved, the responsibility incurred to the principal and to the persons purchasing by the pledges he gave, the very successful and high-priced sales effected, I consider it fair and proper to allow five per cent. commission on the total amount of the purchase money, and a further sum of two and a-half per cent. on the amount of money collected and remitted to England, viz., $2447.97. I disallow commission on moneys collected, but not remitted.

Judgment.

(*a*) 5 Jur. N. S. 637.
(*b*) 1 M. & Rob. 326.
(*c*) 3 C. B. 168.
(*d*) 14 Gr. 40.

1871.

Re J. G. Brown.

Quieting Titles Act—Application by vendee under an inchoate contract.

The first section of the Act for Quieting Titles, 29 Vic. ch. 25, does not apply to the case of a vendee who has contracted to purchase, but who has not completed his contract :—

Where, under such circumstances, the vendee filed a petition without first obtaining the consent of the vendor, the Court, in the exercise of its discretion under the 2nd section of the Act, refused to entertain the petition.

[January, 1871.]

This was a petition by a vendee of land to quiet the title. The petition stated that the petitioner had entered into the contract to purchase, and was in possession. It was not alleged that he had paid his purchase money, or that the vendor was a consenting party to the application.

Mr. *Wells*, for petitioner.

Judgment. Mowat, V.C.—I am of opinion that this case does not fall within the meaning of the first section of the Act (29 Vic. ch. 25). That section provided for an application by "any owner of an estate in fee simple," "whether he has the legal estate or not." A purchaser is, before conveyance, equitable owner for some purposes, but not for all. As the Master of the Rolls pointed out in *Wall* v. *Bright* (*a*): in the interval between the contract and conveyance, it is possible that much may happen to prevent the execution of the contract; and until then, the purchaser's "ownership is inchoate and imperfect;" the ownership "is in the way to pass, but it has not yet passed" to him. "There are many uncertain events to happen before it will be known whether he will" become owner. "The principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences."

(*a*) J. & W. 502.

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The petition is the initiatory step in what is practically a suit against all the world; while the rule of this Court was stated by Lord *Cottenham* to be, that "before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property." (*a*).

Amongst the persons entitled under the corresponding English Act to make application (*b*), "the owner of the fee simple," is named first; but that expression was not considered to include a mere purchaser whose contract had not been completed; and an absolute right in such a purchaser to apply, was not thought proper. His case was specially provided for in the same section, by allowing an application by "any purchaser of a fee simple where his contract empowers him so to do, or the vendor consents."

Judgment.

By the 34th clause of our Act, express provision is made for the case of an investigation "where a decree is made for specific performance of a contract for the sale of an estate;" and the second section gives a discretion to the Court to make the investigation in every case in which an absolute right is not given to a party by the first section. As a general rule, I do not think that a mere contract of purchase should be allowed to give to the purchaser as of course the right to have an investigation of the vendor's title under the Act. A vendor is not bound to expose his title to all the world, unless he has contracted to do so; and it might be most injurious to him sometimes to have it so exposed. An investigation under the Act is against all possible claimants, known or unknown; and the certificate, if obtained, binds them forever. The utmost possible publicity has to be given to such an investigation; and while the contract is *in fieri*, and may never be executed

(*a*) Tasker v. Small, 3 M. & C. 71. (*b*) 25 & 26 Vic. ch. 53, sec. 4

1871. by the purchaser, such publicity should not be as a matter of course within his power. Nor might the construction contended for, be always just to adverse claimants. But where the vendor consents to the application, or the circumstances otherwise render it proper to make the investigation at the purchaser's instance, the discretionary power of the Court under the second section, affords sufficient authority to meet the case.

Re Brown.

RATHBUN v. HUGHES.

Taking replication off files.

Where a replication was filed several years after the filing of the answer by a different solicitor from the one who had filed the bill, but no order changing the solicitor had been taken out, and no notice of filing replication given, the replication was ordered to be taken off the files and the bill dismissed.

[1870.]

Argument.

Mr. *S. H. Blake*, for the defendant, moved on notice to take the replication off the files and to dismiss the bill, on the grounds that no notice of filing the replication had been served, and no order changing the solicitor had been taken out. The replication had been filed by a different solicitor. The suit was commenced in 1862; the answer was filed in the same year; nothing had since been done except the filing of the replication in 1870. He relied on *Lewis* v. *Jones* (*a*).

No one appeared contra.

THE SECRETARY made the order.

(*a*) 1 Grant 120.

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KLINE v. KLINE.

Executor—Right of retainer—Statute of Limitations—Parties in Master's office.

Where an executor of a creditor is also administrator or executor of such creditor's debtor; the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established; and though his claim would otherwise be barred by the Statute of Limitations.

The right of retainer out of legal assets applies to *equitable* as well as to *legal* debts, especially in a case where there is no competition of creditors.

Where a member of a partnership whose accounts the master was directed to take, was by order made a party in the master's office, but on subsequent enquiry it appeared that all liability on his part was barred by the Statute of Limitations, the master on the application of the party added discharged his former order, holding that he was not a necessary or proper party, and that all partnership accounts required to be taken could be taken in his absence.

[February, 1871.]

Statement.

On the 7th December, 1848, articles of partnership were entered into between *George Hughes*, *John Nicholas Kline* the elder, and *John Nicholas Kline* the younger, and the said persons, under the name of "*Hughes, Kline & Son*," commenced the business of storekeepers and millers of flour thereunder. The partnership term began on 1st October, 1848, and was to continue for ten years from 1st January, 1849: one moiety of all debts and losses was to be borne by *Hughes*; the other moiety by the *Klines* in equal shares. The partnership continued to November, 1851, when the entire estate was assigned to *Mitchell* and *McMaster* as assignees for the benefit of creditors. It was alleged that the elder *Kline* was not really a partner, and that his private property was handed to the assignees and applied by them in payment of creditors of the partnership. It was further alleged that the younger *Kline* made a separate assignment at the same time to the same assignees of property belonging partly to himself and

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partly to the elder *Kline*; and that this latter property of the elder *Kline* was applied by the assignees in payment of the private creditors of the younger *Kline*. It was also alleged that the elder *Kline* himself made an assignment at the same time to the same assignees of certain of his real estate, whereout his assignees paid in respect of the debts and losses of the said partnership a larger amount than the elder *Kline* was liable for, and they also paid a large amount in respect of the debts of the firm of *J. N. Kline & Sons*, for which the elder *Kline* was not at all liable, but for one-half of which the younger *Kline* was, as between the partners of that firm, liable. After this time the elder *Kline* died intestate, and letters of administration to his estate and effects were granted to *Anthony Kline*, one of the defendants, who now set up a claim on behalf of the elder *Kline's* estate in respect of the two last transactions: he claimed *first*, for the value of the elder *Kline's* property wrongfully assigned by the younger *Kline* for the benefit of his individual creditors; and *secondly*, the amount paid by the assignees out of the real estate to the creditors of the two partnerships of *Hughes, Kline & Co.*, and *J. N. Kline & Sons*, in so far as the younger *Kline's* estate was accountable in respect thereof. As administrator *Anthony Kline's* first claim arose at the date of the wrongful assignment in November, 1851; and his second claim at the time when the assignees made the excessive payments out of the estate represented by the administrator.

Statement.

Anthony Kline also preferred a claim on his own behalf as one of the co-partners of the firm of *J. N. Kline & Sons*. It appeared their partnership was formed by verbal agreement, about 13th September, 1850, and was composed of the elder and younger *Kline*, and *Anthony Kline*, the claimant. They carried on the business of merchant millers and lumberers from that date, upon the footing that the elder *Kline* should not share in either profits or

losses, but that the same should be borne equally by the other two partners. This partnership was ended on 3rd November, 1851, by the assignment of the estate to *Mitchell* and *McMaster* for the benefit of creditors. It was alleged that during the continuance of the partnership *J. N. Kline* the younger received more of the partnership property than he was entitled to as equal partner with *Anthony;* and that he also obtained from the stock-in-trade a larger amount of goods than *Anthony ;* and that he also converted to his own use a quantity of partnership lumber, of all of which *Anthony Kline* now sought an account and claimed a moiety of such part as the younger *Kline* had received in excess of his share.

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Mr. *S. H. Blake*, for *Hughes*, contended that no account could be had as against *Hughes*, the laches, acquiescence, and delay shewn by the other parties precluded them from claiming as against him. It is only since *Hughes* was made a party that it can be considered that any claim is pending against him: *McFadyen* v. *Stuart* (*a*), *Tatam* v. *Williams* (*b*), as to delay. These cases were before the Mercantile Amendment Act of 1863. The Act was passed 12th May, 1863, the bill in this case was filed November, 1869, and is not saved by the act as to *Hughes's* dealings. The partnership of *Hughes* and *Kline* continued to November, 1851, nothing is alleged in the claim that can take the case out of the statute.

Argument.

Mr. *McCarthy*, for *Anthony Kline*, claimed as administrator of *Kline* the elder, and in respect of property appropriated by the assignees of all; and on the grounds that the creditors were paid by the assignees *Mitchell* and *McMaster* out of the individual assets of *Kline* the elder. As against *Hughes* alone he could not claim, but inasmuch as he asked an account against

(*a*) 11 Grant. 272. (*b*) 3 Ha. 347.

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the other partner, *J. N. Kline* the younger, that would involve an account against *Hughes* and entitle him to it. *Anthony Kline* is executor of *Anthony Kline* the elder, and could not proceed against him; but one partner being liable to account the other cannot set up the Statute of Limitations. As against the testator there would be a right to retain: see *Williams* on Executors. *Anthony Kline* had *primâ facie* a right to get the money from *Job Morris's* hands, if any of *Kline* the younger's money was in *Job Morris's* hands from which it passed to *Tyrwhitt's* we can claim it as surviving executor. The right to retainer arises in favour of a co-executor: *Kent* v. *Pickering* (*a*). No relief is sought as against *Hughes*, he is brought in that he may see the account taken, and can attend if he wishes; besides the account may be in his favour.

Argument.

Mr. *Blake*, in reply.—*Hughes* is either a necessary party or he should be dismissed. There is no authority for having a party present merely to look on. There is authority that all partners must be present at the taking the accounts. The Master has no jurisdiction to bring *Hughes* here, *Hughes* has a claim to get rid of the proceedings unless he submits to be bound by them, it can not be said he will not be prejudiced, there can be no right to bring him here after a lapse of six years. The account should be stopped, not only against *Hughes*, but against all partners; if he is a necessary party and cannot be kept before the Court, the account of the partnership cannot be effectually taken: *Winter* v. *Innis* (*b*). The right of retainer cannot put the party in any better position than an acknowledgment in writing or a payment by another partner. Retainer is a legal claim and is in respect of a legal debt: *De Tastet* v. *Shaw* (*c*). The mere right to have a partnership account does not amount to a legal debt, and a

(*a*) 2 Keen. 1. (*b*) 4 M. & Cr. 101. (*c*) 1 B. & Ald. 664.

right of retainer does not arise in respect of it. Retainer must be of money in hands of *Anthony Kline*, and there must be an actual retainer, just as in the case of appropriation of moneys: *Burge* v. *Nathun* (*a*). In respect of what can they claim? not surely in respect of a debt which but for the retainer is barred by the statute: *Shewan* v. *Vanderhorst* (*b*). They are here now without having exercised the right of retainer, and the exercise of the right can be intercepted in the Master's office: *Williams* on Executors, Am. Ed. 936, English Ed. 975.

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Mr. *Bain*, for the plaintiff.—*Kent* v. *Pickering* is not in point, there, there was a joint liability. Any moneys coming to an executor's hands subsequent to a decree cannot be retained, and the money here did not actually come to *Kline's* hands, he would in fact be paying his own debt by retaining the money, these claims arose during the life-time of *J. N. Kline*. The moment the assets were assigned the claims began to run: in 1853 *A. Kline* became executor, and in 1869 took probate of the will. It is not stated when *Kline* the elder died. *A. Kline* could have taken proceedings to take an account after he was appointed executor, he could have filed a bill for account making *Morris* a defendant, he could at no time have proceeded at law, he could have proceeded in equity only to get his claim ascertained. No account can be taken in the *Hughes* partnership, if *Hughes* is not before the Court: *Hills* v. *Nash* (*c*), the account must be operative as to all. Though plaintiff may not seek relief against any one partner, yet the other partners may have the right of contribution, and the rights cannot be ascertained as between all. *J. N. Kline's* claim is a simple partnership claim, pure and simple, and the statute arises upon it nakedly and bars him unless the question of retainer relieves him.

Argument.

(*a*) 2 Hare 376. (*b*) 1 Russ. & M. 352 & 2 Russ. & M. 75.
(*c*) 1 Ph. 594.

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Mr. *Casselle* appeared for *Tyrwhitt*, and referred to *Thompson* v. *Cooper* (*a*), *Webster* v. *Webster* (*b*).

Mr. *McCarthy*, in reply.—The only claim against *Hughes* is, that we have the right to claim against *Kline*. If the statute has run, on account of death, this Court will not treat the party as within the statute. If the right to contribution exists, the statute does not run against the partner. The Court would give relief in a case where one partner acknowledged himself liable when another partner is discharged and would not allow the party making acknowledgment to escape by saying that the account could not be taken by reason of the discharge of his co-partner, and they might take the account without prejudice to the partner discharged and would perhaps give him costs. As between *Tyrwhitt* and *A. Kline* the latter has the right to get the money, and the decree does not interfere with that right: *Williams* on Executors, p. 971, 922, cap. "Retainer." We can retain for an equitable debt,—we cannot retain it is true out of equitable assets, but the assets here are *legal* being the proceeds of promissory notes, *Cockrock* v. *Black* (*c*). As to the Statute of Limitations, as between creditors the personal representative can be compelled to raise it, but this does not apply to an executor's own debt.

Judgment.

MR. BOYD, MASTER IN ORDINARY.—Both claims of *Anthony Kline* are against the estate now being administered of *J. N. Kline* the younger, (who died in 1854) of which estate, as appears by the pleadings, the defendant *Anthony Kline* and *Job Morris* were appointed executors by will, dated in December, 1854, of which probate was granted to both in 1869, though they had both intermeddled with and possessed themselves of

(*a*) 1 Cole 85. (*b*) 10 Ves. 93.
(*c*) 2 P. Wms. 298

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the estate before that date. *Job Morris* died in June, 1869, and the defendant *Tyrwhitt* is his executor. The defendant *Anthony Kline* thus occupies the position of surviving executor of *J. N. Kline* the younger, and as such alone represents his estate. The bill was filed in November, 1869, and the decree made in September, 1870. Upon the claim, as administrator, *Anthony Kline's* position is this: he as administrator of *J. N. Kline* the elder, an alleged creditor of his copartner *J. N. Kline* the younger, claims an account and payment from the debtor's estate, of which he, *A. Kline*, is the surviving executor. He thus represents both estates, and is in precisely the position where the right to retain was recognized in *Fryer* v. *Gildridge* (*a*). There *A* was indebted to *B*, and *B* made *C* his executor, and *A* also made *C* his executor, then *C* was allowed to retain the assets of *A* in satisfaction of the debt owing by *A* to *C* as *B's* executor, and it was said that the same person being executor of obligor and obligee, and there being sufficient assets of obligor, the debt was presently satisfied by way of retainer. See also *Thompson* v. *Cooper* (*b*). But in the case in hand it is objected, that the debt is an equitable one, in respect of which the right to retain does not arise.

Judgment.

Expressions are to be found in the books which are relied upon in support of this objection, such as "a Court of Equity will never assist a retainer," and that "unless a party can shew a legal right to retain it is never given to him." Now these are to be construed with reference to the particular cases in which they occur, and it will be found that such language is used where the claim to retain is in competition with the claims of legal creditors. Take for instance the language of Lord *Westbury* in *Boyd* v. *Brookes* (*c*), where

(*a*) Hob. 10 *a*. (*b*) 1 Coll. 85. (*c*) 34 L. J. N. S. Ch. 605.

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he says "this principle of law is a barbarous one, but it is in favour of the right of the executor to retain, as against creditors of equal degree, money for which the testator is his debtor. It is much to be regretted that in a case of equitable distribution the result should be so unequal." And it was doubtless to remedy this state of the law that sec. 28 of our Property and Trusts Act was inserted therein. But the case is different where the assets are sufficient to pay all, or where the executor is the only creditor. The foundation of the doctrine of retainer consists in the union of the right to sue and the liability to be sued in one and the same person; and the principle is laid down that as the executor representing both debtor and creditor cannot sue himself, he may appropriate the assets in satisfaction of his demand. He can go, then, to the same extent in retaining as he could have gone supposing he were in a position to sue for his debt, *Toller's* Executors, p. 297. He can retain in respect of any claim legal or equitable for which he could have sued at law or filed a bill in equity. As against creditors at law, the executor's right to retain is a legal right, and is usually based upon a debt at law: as between the executor and the estate it is of the very essence of equity, that he be allowed to repay himself before accounting to the estate, and paying over the assets. In *Cockrot* v. *Black* (*a*) and in *Loomis* v. *Stotherd* (*b*) retainers for equitable debts were allowed, and many cases of a like kind are to be found. Even at law the right to retain for an equitable debt has been recognized (c), and it will be given effect to unless there is in fixing the amount due "such difficulty as to amount to impracticability." Thus in *De Tastet* v. *Shaw* (*d*) where the ascertainment of the claim for retainer involved the taking of partnership accounts, the Court refused to entertain the claim. The reason assigned was, that the

Judgment.

(*a*) 2 P. Wm. 299. (*b*) 1 S. & St. 461. (*c*) See Loane v. Casey, 2 Black W. 965. (*d*) 1 B. & Ald. 669.

amount constituted an item in a partnership account, and the partnership account would have to be taken in order to ascertain how much was due, and justice could not be administered without affording the plaintiff an opportunity of controverting the amount of the debt, which could not be done before a jury. But all this can be done in the Master's office, and for this reason the claim to retain in the present suit is one which should be entertained, though equitable in its nature, and though it involves the taking of partnership accounts. 1871. Kline v. Kline.

It is further objected that here the executor has in fact no assets in hand of the testator's estate applicable by way of retainer; that at all events there has been no appropriation or retention by him of such assets before suit; that it is now too late to claim such right, because after decree the executor cannot allow to be asserted, and cannot assert himself, a claim which is barred by the Statute of Limitations, in opposition to other parties to the suit, and that the claim of the executor in this case is barred by the Statute. Judgment.

The plaintiff's bill charges that both executors of *J. N. Kline*, the younger, took possession of, and dealt with his estate, and that they both received large sums of money thereout, and that the defendant *Kline* has applied a part thereof to his own use, and that *Job Morris* left a large sum of money at his death belonging to this estate, which has passed into the possession of the defendant *Tyrwhitt;* that *Kline*, the surviving executor, was endeavouring to get this money into his hands, and the bill prays that therein he, *Kline*, may be restrained (and this is put upon the ground of his insolvency, and that if the money went into his hands it would be lost to the plaintiff); and the bill further prays that *Kline* may account for his own dealings and that of his co-executor with the estate in question. *Kline's* answer does not deny that there were assets of the estate, and

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does not in terms deny that he received some of such assets; it does deny that he intermeddled with that part of the testator's estate which was in the hands of *Job Morris*, and which appears to be represented by the sum of money in *Tyrwhitt's* hands.

Now, what was the condition of affairs when the testator, being a debtor to the estate of the elder *Kline* as represented by his administrator *Anthony*, made that same administrator one of his executors? The law is thus laid down: "If a debtor makes his creditor, or the executor of his creditor his executor, *and if the executor has assets of the debtor*, it is an extinguishment of the debt, because it is within the rule that the person who is to receive the money is the person who ought to pay it, though he is the person that is to receive it; but if he has no assets, then he is not the person who ought to pay. The debt, in other words, is not extinct unless upon a supposition that the executor has assets, which he may retain to pay himself. The same doctrine prevails where the debtor appoints his creditor to be one of several executors, *if the creditor administers*. But if the creditor [being one of two executors] neither proves the will nor acts as executor, he may bring his action against the other executor" (*a*).

Judgment.

The executor who is a creditor of his testator may in establishing his claim in the Master's office bring in his account in one of two ways: he may bring in an account of what he is chargeable with as against the estate, and may in his discharge credit himself with the amount of the testator's debt to him, and this is the mode usually adopted where the debt is ascertained. This will not relieve him from proving the fact of the testator's indebtedness in the ordinary way, but he is relieved from establishing that such debt is due when the account is brought in, and he needs only make

(*a*) Williams Ex. 1222, &c.

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out that it was due when he had the assets in his hands wherewith he has satisfied it. In cases of this kind the Statute of Limitations can never be set up in the administration suit, for the executor had the right so to prefer himself. In the present case the account is not so brought in, probably could not have been so framed, as the ascertainment of the amount of the alleged debt due to *Anthony Kline* involves the taking of accounts between him and the testator. The executor may also bring in his claim as an ordinary creditor, and then the question will arise whether, like an ordinary creditor, he is put to establish that his debt is due and payable at the date of carrying in the account, or whether as against an ordinary creditor, the Statute of Limitations can be set up in bar of his claim. This is to some extent a new point, arising upon the frame of the accounts in the present suit. So far as I can judge, the right determination of this matter will resolve itself into a question of whether the estate has or has not any assets in respect of which the right of retainer can arise. Be it remembered always that here there is no conflict of creditors, but that the executor is the only person claiming to be a creditor. Now it is laid down in very broad terms that the executor is entitled to retain his debt even though barred by the Statute of Limitations during the life time of his testator: *Hill* v. *Walker* (*a*), (in which case the statute had run nineteen years), *Clinton* v. *Brophy* (*b*). But in these cases the executor had framed his accounts in the manner I have first adverted to, and there had been an actual retainer by him. In the Irish case the right to retain was likened to a right of lien, which can be enforced though the right of action is barred by the statute.

Judgment.

The right to retain, however, has reference not only to past, or present, but to future assets; and it would seem

(*a*) 1 K. & J. 166.

(*b*) 10 Ir. Eq. R. 139.

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to be enough that the executor should, while the matter is in the Master's office, assert his right to retain out of any available assets to give him the benefit of this privilege: even as against the Statute of Limitations. In *Player* v. *Foxall* (*a*) the right to retain was negatived because this claim was not set up by the answer, nor in the Master's office, but only upon further directions, and the executor was therefore taken to have waived it. It was laid down in *Winter* v. *Hicks* (*b*) that if an administrator claims his debt before the Master, even though he does not distinctly retain his debt before suit, that claim is sufficient to entitle him to retain it. Express appropriation is not necessary as was contended before me: if there are assets in the executor's hands the Court will presume he has appropriated them to satisfy his claim; and it is possible that it may be found in every case where, upon taking accounts, an executor is held chargeable with assets, that he will have the right to

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discharge himself from liability therefor to the extent of his claim against the testator. In the case of *Weeks* v. *Gore*, reported in a note at p. 184 of 3 *P. Wms.* it appeared that *A* lent money on bond to *B*, who dying intestate *C* took out letters of administration to him, after which *C* dying, *A* took out administration *de bonis non* to *B*. It was held that *A* could retain, and though he happened to die before he had made any election in what particular effects he would have the property altered, yet the Court said it must be presumed he would elect to have his own debt paid first; and this being presumed, there would remain no difficulty as to altering the property: for as the executors of *A* were to account for the assets of *B*, they must on that account deduct the amount of the money lent by *A* to *B*. Now in *Weeks* v. *Gore* the executors of *A* would not represent *B's* estate, and they of themselves (according to the rule in *Hopton* v. *Dryden* (*c*) could not have retained to the amount of *A's* debt, out of

(*a*) 1 Russ. 539. (*b*) Taml. 475. (*c*) Prec. in Ch 5

B's assets. It was only, then, as representing *A*, and in furtherance of justice, that they were allowed to complete the constructive or imputed retainer, which in point of fact *A* had never exercised. 1871. Kline v. Kline.

The question as to whether laches or the Statute of Limitations would operate against the executor's right to retain, arose upon an appeal from the Master's finding in *Stahlschmidt* v. *Lett* (*a*). The Vice Chancellor says, "the right to retain is a mere passive right, and consists only in holding the assets, *or in asserting a right to hold the assets*, which is the same thing. It is a right which exists as well before the assets are received as after they are received, while they are in the executor's hands. Being thus a passive right, it would be a very strong thing where there is a debt, and where there was certainly at one time a right to retain in respect of that debt, to hold that merely because when it might have been asserted in the answer it was not asserted, the right is lost. To hold," he continues, "that the right was asserted too late in the Autumn of 1846, would be to say that the right is lost by non-assertion, although asserted before the executor had accounted, and before he had settled the accounts, when the right of retainer, if it is to prevail, must receive its ultimate effect. There is, I believe, no authority for that proposition. If the question arises, whether the right of retainer exists against money in Court, I am not aware that it has been held that in order to make it good against the money when paid into Court, it must have been asserted before the money was paid into Court, for the fact is, if it had been asserted before the money was paid into Court, the money would probably not have come into Court. When the right of retainer was asserted in this case," he goes on, "the estate had not been wound up and the proceedings were in pro- Judgment.

(*a*) 1 Sm. & Giff. 415.

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gress, which are in progress now, and the assets are not settled now. The view of the Master is, that the debt was barred by the statute, and he has disallowed it simply on that ground. This is not correct, and I cannot find any just ground upon authority or principle for dealing with a right of retainer of an executor who is and continues to be in receipt of the assets upon the footing, that if not asserted at some particular time before the report it will be lost." He says further: "It has been decided that the right of retainer is not lost by a decree of this Court for administration. But if a right of retainer is asserted after a decree for the administration of assets, *and it cannot have been asserted before,* it has been decided that the executor does not lose his right of retainer when he has paid the moneys which are the assets into Court." In his answer *Anthony Kline* expressly sets up his claim to retain in respect, at all events, of the moneys in the hands of his co-defendant, and I am not at present prepared to say whether if in my office he is found to be chargeable with any assets of the estate, he may not be allowed to discharge himself *pro tanto* upon proof of his claims. In the old case of *Bathurst* v. *De La Touch*, to be found in the note at p. 9 of 34 Beav., the direction was, that in taking the account of the personal estate of the testator what should be found due should be allowed to be retained by the defendant, as he is executor, in due course of administration. In a late case the distinction is pointed out between the duty of the executors to set up the statute in the case of an ordinary creditor proving a claim and the privilege of the executor himself when he is a creditor of the estate. The Master of the Rolls says: "In *Shewan* v. *Vanderhorst*, [which was relied upon in the argument by Mr. *Blake*] it is settled that after decree an executor cannot exercise any discretion at all, and that he is bound to take the objection of the Statute of Limitations, and that any creditor or other person interested may insist on having that defence

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set up. After decree, an executor can do no act to vary the rights of the parties. The right of retainer stands on a different footing. The executor having the right of retaining his debt before the suit was instituted, it has been held that it is not forfeited by the institution of a suit." *Phillips* v. *Beal* (No. 2) (*a*). And I find in *Crooks* v. *Crooks* (*b*) the then Chancellor remarks: "The right of an executor to retain a debt barred by the statute appears to have been considered at one time clear, and it will be found, probably, that *Shewan* v. *Vanderhorst* does not establish any contrary doctrine." He there lays it down that the first step in order to determine the question of the right to retain, is to find whether the executor is a creditor, and that this should be enquired into by the Master, notwithstanding that the debt in itself appears to be barred by the statute. See also *Emes* v. *Emes* (*c*), *Tipping* v. *Powers* (*d*). Of course if it were clear that this estate had no assets in fact or by construction of law in the executor's hands, and that he was not chargeable in respect of assets received by him and not accounted for, whether through his default or otherwise, I should then think that he must come in as a mere creditor, and that the other parties to the suit could insist upon the statute as against his claim. If this were the state of facts here, then it would be necessary to consider whether under the circumstances of this case his claim as a creditor is barred, and I understand that Mr. *McCarthy* urges the point that his client's claim in this light is not barred. It would be necessary to settle this point, in order to determine the executor's right to be paid out of the real estate, or out of assets with which he is not chargeable, if any such there be. At law if there were assets in the executor's hands the debt would be extinguished as the result of the doctrine of retainer: that would probably not be the result in equity as to an equitable debt of the same unascertained nature as the

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(*a*) 32 Beav. 26. (*b*) 4 Gr. 617. (*c*) 11 Gr. 828. (*d*) 1 Ha. 405.

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present, or in a case where the assets had not reached the executor's hands. It woud probably be held in such a case and during such time, while the union of a debtor-and-creditor-character existed in the executor, that the operation of the Statute of Limitations would be suspended, and the right to prove for such a claim would not in equity be extinct. These points were not argued, and I abstain from deciding upon them at the present stage of investigation, especially as the facts are not fully before me. I also abstain from giving any opinion as to whether or not the sum which was at first ordered to be paid into Court in that part of the decree subsequently struck out, can be called assets in the hands of *Anthony Kline*. The cases cited only went to this, that where there are assets in the hands of two executors, one of them can retain in respect of the amount in his own hands. That is not the present case where the surviving executor is claiming the transfer and possession of moneys as against the personal representative of his co-executor deceased. It is a point of some difficulty, but one which it is not necessary for me now to pronounce upon.

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The safe and proper course to pursue at present, as it appears that there have been and are assets of the estate, is to direct *Anthony Kline* to proceed to the proof of his claim upon which he bases his right of retainer, notwithstanding any of the objections urged thereto. Those which I have not disposed of will be more properly determinable when the accounts are taken, and the *locus standi* of *Anthony Kline* as a creditor is established. What I have said will apply to all the claims of *Anthony Kline*, whether individually or as administrator of his father's estate.

There is yet to be disposed of, however, the contention of *George Hughes*, made a party in my office. When he was made a party the facts now set forth were not

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stated; it only appeared that he was the member of a partnership in respect of which *Anthony Kline* claimed to be a creditor of the testator. The ascertainment of this appeared to involve, as in ordinary cases, the taking of the partnership accounts, whereat all parties have a a right to be present. *Primâ facie Hughes* was properly made a party under these circumstances. But it now turns out, as conceded by Mr. *McCarthy*, that as to *Hughes*, all liability to, and claim against the partnership has been long since extinguished by lapse of time (*a*). He was made a party that he might attend upon the taking of accounts; but these accounts in no way affect, or can affect him, and he is now to all intents and purposes a person utterly indifferent to all the partnership matters involved in this investigation. No object can be gained in keeping him any longer as a party to the suit, and I think it is competent for me, upon the new facts now disclosed, to discharge my order making him a party. The costs incurred by him must be dealt with elsewhere, but in my view they should be borne equally by the plaintiffs and the executors, as neither of them disclosed the facts upon which I now hold him to be entitled to his dicharge. But the plaintiffs urge that if he is not before the Court, or rather if the accounts of the partnership cannot be taken against him, then the partnership accounts of *Hughes, Kline & Co.* cannot be taken at all. To this, I do not agree. Many cases are to be found where suits have been maintained against one joint owner, or one partner, under special circumstances: as, for instance, where one has been paid in full, or his share provided for apart from the suit, and he cannot be affected by the accounts between plaintiff and defendant: *Weymouth* v. *Boyer* (*b*). So under the old practice, partnership accounts would be taken in the absence of one partner from the record, he

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(*a*) See Stat. of Can, 1863, 26 Vic. ch. 45.

(*b*) 1 Ves. 416.

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being out of the jurisdiction: *Derwent* v. *Walter* (*a*). So in *Cockburn* v. *Thompson* (*b*) Lord *Eldon* after specifying a variety of cases in which accounts will be taken and relief administered upon a record technically incomplete, proceeds to say, "so as to partnerships, the Court will settle the account between those parties who are before it: and do all possible justice." *Cockburn* v. *Thompson* was a case where the bill was filed on behalf of a society to make one of the members account for the sums he had received, and it was thought not to lie in his mouth to say that the society should not proceed against him unless all the members were made parties. See also *Wallworth* v. *Holt* (*c*). Where a person has a right against several individuals who are liable to common or consecutive obligations, he may in the first instance file his bill against some of those persons, who are bound to make good his demand. If the answer raises the point that others are liable with the defendant, and from whom he is entitled to contribution or indemnification, it would seem that then the bill would have to be amended by adding such parties as defendants in order to prevent circuity of action: *Totten* v. *Douglass* (*d*). But in the present case *Hughes* is not liable either to the claimant or to any of his co-partners, so that in my view he is not a proper party, much less a necessary one. Similarly it was held in *Brown* v. *De Tastet* (*e*) that where *A*, *B*, and *C*, being partners together, *A* agrees with *D* to give him a moiety of his share of profits in the concern, an account might be decreed between *A* and *D* without making *B* and *C* parties. And in the old case of *Conslack* v. *Cely* (*f*) a bill was allowed against one of two executors seeking no more than an account of his own receipts and payments. So in an anonymous case in the same book (*g*), a bill against sixteen out of two hundred and fifty subscribers for a certain purpose

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(*a*) 2 Atk. 510. (*b*) 16 Ves. 329. (*c*) 4 M. & Cr. 619. (*d*) 15 Gr. 126. (*e*) Jac. 284. (*f*) 2 Eq. Ca. Abr. 165, pl. 2. (*g*) 166, pl. 2.

was held to lie against these sixteen to make them bear their proportion of the loss, and it was said that their proportion of the loss would appear before the Master as well as if all the two hundred and fifty subscribers were present, and so it would be no prejudice to the sixteen defendants. The matter in dispute upon the present accounts is one between two of the partners, in which *Hughes* the third has no interest, and if he ever had an interest therein the Statute of Limitations is a bar to all proceedings against him by either of his co-partners.

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Re Hardy—Poole v. Poole.

Solicitor—Negligence—Costs.

Where a solicitor incurs useless and unnecessary costs by instituting a suit in the Court of Chancery in respect of a subject matter within the jurisdiction of the County Court, the surplus of the costs in Chancery over the Inferior Court tariff will not be allowed to him against his client.

Where in a suit brought as above the costs in Chancery had been disallowed *in toto* between the parties, the Master allowed the plaintiff's solicitor County Court costs, the client having through the exertions of his solicitor derived some benefit from the suit.

[March, 1871.]

Statement.

A bill was filed in this Court on a mortgage upon which there was due less than $200. When the bill was filed it appeared by the registry that a subsequent mortgage for $500 stood against the lands undischarged. The decree directed the Master to inquire as to subsequent incumbrances, and on the reference before him it appeared that the subsequent mortgage had been paid off before the filing of the bill, but the plaintiff's solicitor had no notice of the fact, and stated that he had been led by the subsequent mortgagee and the mortgagor to

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On taxation between the plaintiff and his solicitor, the client resisted payment of any cost to the solicitor, and contended that he had, prior to the filing of the bill, instructed the solicitor to go on, without regard to the subsequent mortgage. It was also contended that if the solicitor had procured from the Master a proper statement in his report of the conduct of the mortgagor, when applied to as to the subsequent mortgage, the Court would have given costs against him, and the failure to do this was such negligence as to disentitle the solicitor to costs against his client.

Mr. *C. Moss*, for the solicitor, contended that no negligence could be imputed to the solicitor. It is clear that Mr. *Hardy* was not informed that the *Lake* mort-

Argument. gage had been discharged, and he proceeded in *Poole* v. *Poole* upon information derived from the mortgagor and the subsequent mortgagee; no negligence can be imputed up to that point. The only further fact that can be urged to disentitle him to costs is, that he did not bring before the Court all the facts upon which the Court would have been able to pronounce upon the question of costs, the fact of the Court deciding against the plaintiff upon the report does not shew sufficient negligence to deprive the solicitor of his costs. The Master can go behind the judgment of the Court as between party and party, and can consider the propriety of the judgment: *Backing* v. *Chandles* (*a*), *Williams* v. *Gibbs* (*b*). Here the question is one of negligence, and the Master sits as a jury to determine it. At all events *here* the conduct of the solicitor has not been so negligent as to deprive him of costs (*c*). Here there was a benefit to the plaintiff *Henry Poole* in *Poole* v. *Poole*. There was a contest

(*a*) 3 Camp. 19. (*b*) 5 A. & E. 208. (*c*) 7 C. & P. 289.

as to the validity of the mortgage, and this was declared in the plaintiff's favour in the Chancery suit, and it is therefore stronger than where no benefit resulted. Mr. *Hardy* did not neglect what was necessary to entitle him to the costs of the suit, there was no ignorance of the law or practice in his conduct of the cause, and he instructed his agents to have the special circumstances certified—everything had been done to get the report right, and after report he advised with counsel. There is no trace of gross negligence or carelessness. He acted upon the advice of counsel and exercised diligence and reasonable skill: see *Lee* v. *Dickson* (*a*), which is somewhat like this, and goes to shew that if the solicitor reasonably supposed that he would get costs on the report as it stood, he was justified. *Hardy* could not disregard the second mortgage, though his client spoke of it as a *bogus* mortgage. The plaintiff could not contest it, and it was proper to put the holder of that mortgage in a position in the Master's office to litigate the matter, the County Court jurisdiction would have been ousted if the registered mortgage had remained undischarged as it was at the filing of the bill.

Argument.

Mr. *Mc Williams*.—The evidence of *Henry Poole* shews that he told his solicitor to disregard the *Lake* mortgage. The evidence in *Poole* v. *Poole* was directed to shew that the *Lake* mortgage was satisfied, and not to the point that *Hardy* had been misled into filing the bill in Chancery: *Marshall*, p. 474. The inquiry is not only as to negligence but as to the uselessness of the proceedings: *Roe* v. *Stanton* (*b*).

Mr. *Moss*, in reply.—It was defendants duty to have registered his discharge, and upon these grounds costs might have been awarded to the plaintiff in *Poole* v. *Poole*.

(*a*) 3 F. & F. 744.

(*b*) 3 C. & P. 341.

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MR. BOYD, MASTER IN ORDINARY.—The questions argued before me were those of negligence or no negligence in some aspects of the suit of *Poole* v. *Poole*. To these I shall first address myself. It is said on behalf of the solicitor, that under the circumstances, he properly filed his bill in the Court of Chancery and not on the equity side of the County Court. My conclusions, upon a persual of the evidence, are these: that the solicitor was made aware of the existence of the *Lake* mortgage, and of the strong and abiding impression of his client that it was an invalid instrument; that thereupon he made inquiries about it, which led to no satisfactory result; that *Lake* and *Caleb Poole* purposely avoided giving him any information; and that he filed the bill in *Poole* v. *Poole* entirely in the dark as to the true state of affairs in respect of this mortgage. And I find that he proceeded in the Court of Chancery after his client told him to go on and disregard the *Lake* mortgage.

Judgment.

Now upon this state of facts I cannot bring myself to think that Mr. *Hardy* fully discharged his duty to his client. True it is, that if an attorney ignorantly or carelessly brings his action in a Court which has no jurisdiction, he is liable to an action on the score of negligence: *Williams* v. *Gibbs* (*a*), *Cox* v. *Leach* (*b*). Yet it is equally true that if there are two forums open to the client, either of which will minister due relief according to the circumstances of his case and one of which will in the event be preferable to the other, then it is the solicitor's business to explain to his client fully the position of affairs, and give him the option of the Court. *In re Clark* (*c*) L. J. *Knight Bruce* says, "In some cases notwithstanding the impropriety of bringing an action, the client may be liable to pay the costs of it.

(*a*) 5 A. & E. 208; S. C. 2 Harr. & Woll. 241.

(*b*) 1 C. B. N. S. 617. (*c*) 1 D. M. & G. 48.

The client may have untruly or insufficiently informed the attorney upon the facts of the case, or on being informed by his attorney that an action is hopeless or a defence unreasonable, may say that the proceedings shall, whether wise or unwise, whether of probable or improbable, certain or uncertain success, go on. In such a case the client may be bound to pay the costs." See *Stevenson* v. *Rowland* (*a*).

If by proceeding in one way the client runs the risk of losing costs, it is the solicitor's duty to inform the client of the risk he runs. In the present case it was the duty of the solicitor to inform *Henry Poole* that if the second mortgage had no existence as an incumbrance or was satisfied, he would run the risk of losing his costs of the suit in Chancery, and on the other hand that he could foreclose the equity of redemption in his own mortgage in the County Court with costs of the suit, and leave the second mortgage outstanding as it was: see *Allison* v. *Rayner* (*b*), *Gill* v. *Lougher* (*c*), *Steward* v. *Willthorne* (*d*), *Waine* v. *Kempster* (*e*), *Graham* v. *Lawrence* (*f*), *Scanlan* v. *McDonald* (*g*). The solicitor omits to do this, and files his bill in Chancery, trusting that all will end well.

Judgment.

Supposing, however, that Mr. *Hardy* was justified in filing the bill as he did, it was his duty at all events to examine the defendant in the Chancery suit at the earliest possible moment touching this second mortgage, and in that safe way informed himself whether or not he was *rectus in curia*. It is said in *Potts* v. *Lawrence* (*h*), that if an attorney has reasonable and probable grounds for commencing an action, and desists from prosecuting it, because he *afterwards* discovers

(*a*) 2 Dow. & Cl. 119.
(*b*) 7 B. & C. 441.
(*c*) 1 Crs. & J. 170.
(*d*) 10 Bing. 491.
(*e*) 1 F. & F. 695.
(*f*) Ib. 285.
(*g*) 10 U. C. C. P. 104.
(*h*) 6 C. & P. 428.

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that the cause cannot be successfully proceeded with, he is entitled to recover costs from his client. Mr. *Hardy*, after bill filed, could, by an examination of the defendant, have removed all the uncertainty as to *Lake's* mortgage, and upon learning the true facts could have dismissed his bill, and recommenced his suit in the County Court, or he could have fixed the defendant (if he testified untruly as to the mortgage being paid) in such a way that in the issue of the Chancery suit costs would have been awarded to the plaintiff. But this course is not adopted; and the first that is known of the second mortgage being satisfied is in the Master's office after decree. Even then if the facts now before me had been disclosed, and specially certified by the Master, the Court might have seen fit to grant the plaintiff his costs of suit as between party and party, in which case, no contention such as the present would have arisen. But the special finding in the report is merely that there was on the registry a second mortgage for $500 which was satisfied before suit, though not discharged till after suit, and that no notice to the plaintiff of such payment was proved before suit. This certificate goes as far as was warranted by the evidence laid before the Master at Brantford. There was other evidence which might have been given in furtherance of the plaintiffs' claim for costs, and I do not think that the circumstances in evidence before me excuse the solicitor in the non-production of such evidence. Mr. *Hardy*, as a solicitor, should not have been guided by the opinion of a clerk in the office of his agent; and the opinion of counsel does not exculpate the solicitor, or give him a right to costs, in matters of ordinary practice or in cases where all the facts are not laid before or known to the counsel: *Godefrey* v. *Dalton* (*a*), *Bryan* v. *Twigg* (*b*).

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(*a*) 6 Bing. 461.

(*b*) 3 L. J. N. S. Chy. 114.

If the further matters now in evidence had been brought before the Court on further directions, and would have turned the scale in the plaintiff's favour as to costs, then I do not think any satisfactory excuse is made out for not having them before the Court; and if being brought before the Court they would not have availed the plaintiff, then his solicitor would remain in the same plight as he now is touching his costs of that suit. The bill was filed in Chancery, not at the client's instance, but by the solicitor, who took upon himself all the risks incident to that course as between him and his client. If the Court had found the plaintiff entitled to costs this would have enured to the solicitor's benefit: *Dimond* v. *Clarke* (*a*), if not, as the case stands now, that would not relieve him from the consequences of acting upon his own responsibility, in a matter where his client should have been fully informed of the law and consulted upon the course of procedure. It has been said that when there are two ways of doing a thing, one being clearly right and the other doubtful, then to do it in the doubtful way is negligence: see *Levy* v. *Spyers* (*b*). Judgment.

For these reasons I cannot come to the conclusion that Mr. *Hardy* is entitled to his bill as he has brought it in; and the question now is, what he is entitled to upon taxation. My jurisdiction to deal with the questions raised was not disputed.

It is not here the question whether an action would lie against the attorney; to have an action against him there must be gross ignorance of the law, or ordinary negligence on his part and injurious result or loss of benefit to the client; these two things must concur: see *Parker* v. *Rolls* (*c*), but less than these are sufficient to deprive him of his costs. If the proceedings are utterly useless, or if they are unnecessary, the solicitor will get

(*a*) 1 Chit. 222. (*b*) 1 F. & F. 5, *n*. (*c*) 14 C. B. 705.

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no costs at all: *Bracey* v. *Carter* (*a*). If the proceedings are not utterly useless, but in some measure beneficial, yet done carelessly, unskilfully, or negligently, then some difficulty exists as to what is the proper course of procedure in a suit for costs or upon a summary reference under the statute. The rule is broadly laid down in some cases and text books that "negligence affords an answer to the attorney's claim for remuneration, provided it be such as to preclude the client from deriving any benefit from his services but not otherwise": *Pulling*, 235. See also *Templer* v. *McLachlan* (*b*), *Mayne* on Damages (*c*), *Huntley* v. *Bulwer* (*d*), *Cliffe* v. *Prosser* (*e*), *Dunn* v. *Hallen* (*f*), *Fletcher* v. *Winter* (*g*). In these and other cases it is said that the solicitor is entitled to recover for his costs unless the services are wholly useless and valueless, even though the conduct of the solicitor might be the ground of an action of negligence; and that when the work done for the client is partly useless, or where being useful there has been negligence in respect to it, the client's remedy is only by cross action.

Judgment.

The correct rule at law on this point as laid down in *Hill* v. *Featherstonehaugh* (*h*), *Shaw* v. *Ardin* (*i*), and fully expounded in 2 *Smith's* L. C. 6th Ed. 23–25, is this: in an action to recover the amount of the bill, if there be an entire item for work partly useful and partly useless or negligently performed, the jury cannot reduce that item, and the client must seek redress in a cross action, but entire items for useless work may be discarded by the jury. The distinction is between a useless item severable from the rest of the account and one not so severable. See also *Pigott* v. *Williams* (*j*.)

(*a*) 12 A. & E. 375.
(*b*) 2 B. & P. N. R. 186.
(*c*) pp. 41, 42.
(*d*) 6 B. N. C. 111.
(*e*) 2 Dowl. 21.
(*f*) 4 F. & F. 138.
(*g*) 2 F. & F. 642.
(*h*) 7 Bing. 569.
(*i*) 9 Bing. 287.
(*j*) 6 Madd. 95.

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Upon a summary reference by Common Law Courts it is held that the taxing officer has no jurisdiction to disallow items or a whole set of costs, on the ground of negligence: *Martbett* v. *Parker* (*a*). He can however disallow all items or sets of costs which are unnecessary, though he perhaps cannot disallow anything on the gound of its being useless: *Heald* v. *Hall* (*b*), *Cliffe* v. *Prosser* (*c*). See also *Williams* v. *Nicholas* (*d*), which in some features resembles the present case. It is clear that a Master in Chancery, under a reference to tax, can disallow items and even the whole bill on the ground that the services were unnecessary, useless, or unskilfully and negligently performed: *Re Bilton* (*e*), *Alsop* v. *L'Oxford* (*f*), *Re Atkinson* (*g*), *Thompson* v. *Milliken* (*h*), *Re Clark* (*i*).

Upon an order similar to the present order it was held in *Thompson* v. *Millikin* as subsequently reported (*j*), that the solicitor was entitled to costs where the client had to some extent benefited by the suit, and that under such an order the Master had no authority to institute an inquiry as to any loss sustained by the client through the negligence of his solicitor in the constitution or conduct of the cause. In *Scanlan* v. *McDonough* (*k*), upon an order at law to tax costs of plaintiff's attorney between attorney and client, it was held that where a suit was successfully brought in the Superior Court for a sum which was within the jurisdiction of the County Court, and in which a certificate for costs was refused at the trial, then the client was only liable for County Court costs to his attorney in the absence of special circumstances to entitle the attorney to all he claimed.

Judgment.

(*a*) 7 M. & W. 767.
(*b*) 2 Dowl. 163.
(*c*) 2 Dowl. 71.
(*d*) 1 Dowl N. S. 840.
(*e*) 9 B. 272.
(*f*) 1 M. & K. 564.
(*g*) 26 B. 151.
(*h*) 13 Gr. 104.
(*i*) 1 D. M. & G. 48.
(*j*) 15 Gr. 197.
(*k*) 10 U. C. C. P. 104.

1871. Re Hardy. *Draper*, C. J., says, "If indeed the plaintiff (client) had been informed that by bringing the action in the Superior Court he incurred the risk of recovering a verdict, which would only entitle him to County Court costs, and nevertheless directed the action to be brought in this Court, he would be liable to pay his attorney's costs accordingly, whatever he might recover, or if he failed altogether; but that is not shewn to be the case; all we see is, that he gave no direction in that respect, and when aware that the suit was being carried on in this Court, expressed no dissatisfaction. I have little doubt that in reality he knew nothing about the consequences, or the difference, and this is no case to apply the maxim: *ignorantia juris non excusat.* He might reasonably expect his attorney to inform him."

Judgment. The case of *Lee* v. *Dixon* (*a*), (cited by Mr. *Moss*), does not conflict with this decision, and is indeed in my view not applicable to the questions arising upon this taxation. There the attorney was sued for improperly instituting an action on behalf of his client in the Superior Court instead of the County Court; and the grievance was, that the suit having failed the client had to pay the costs of defence to a larger extent than if he had been beaten in the Inferior Court. Negligence or unskilfulness which may be sufficient to deprive an attorney of costs as against his client, may yet not be sufficient to give the client a cause of action against him.

At first blush the case in 15 Gr. seems to conflict with *Scanlan* v. *McDonough*, but upon consideration it will be found that both may well stand together. In the Chancery case the solicitor not only brought the suit to a successful termination, but also obtained for his client the costs of litigation. The solicitor failed to secure certain benefits which would have accrued if he

(*a*) 8 F. & F. 744.

had added another person as defendant; but that was a matter of complaint which, if valid, would have given a right of action at law for damages. The proceedings were complete in themselves; and all the advantages that could have been gotten, in a suit so constituted were obtained. But in *Scanlan* v. *McDonough* (as in *Poole* v. *Poole*) the client could not possibly have had a cross action for negligence or other cause, because the suit was successful and no injury whatever resulted to him. The only injury he could be exposed to was the liability to pay more costs to his attorney than was fair and equitable under the circumstances. The Court interfered to prevent their officer making a profit out of his unnecessary proceedings in a Superior, instead of an Inferior, Court at his client's expense. This is in effect holding in a manner not contradictory to the authorities, that the surplus of Chancery costs over the Inferior Court tariff represents costs uselessly and unnecessarily incurred, which can readily be ascertained and separated from the rest of the bill by the taxing officer. I am prepared to follow the principle of this decision, and to direct the taxation of Mr. *Hardy's* costs upon the County Court scale. If *Henry Poole* contends, because all costs were disallowed in the Chancery suit, that all costs should be disallowed to his solicitor, then I do not think the authorities warrant me upon the present order in so holding—these costs being of a suit wherein the client has succeeded in his contention by the exertions of his solicitor.

1871.

Re Hardy.

Judgment.

The costs will be taxed on the County Court scale, as if the *Lake* mortgage had been disregarded, (*i. e.* as if there had been no reference to the Master as to the subsequent incumbrancers.)

1871.

WEISS v. RANKIN.

Demurring—Costs.

A plaintiff amending his bill after service of a demurrer, and before the same has been set down for argument, although after a longer period than eight days has elapsed, is liable for 20*s.* costs only, and not for taxed costs.

[February, 1871.]

A demurrer had been filed December 17th, 1870: order to amend taken January 26th, 1871.

Mr. *Hodgins*, for the defendant, claimed full costs. He referred to Order 14, Rule 14, English Orders (*Morgan*, 429); and to Rule 15; *Baldwin* v. *Borst* (*a*), and contended that the demurrer not having been set down within eight days, the defendant was entitled to the full costs, as if it had gone to argument and the demurrer been overruled: he cited also *Martin* v. *Reed* (*b*), *Lowe* v. *Campbell* (*c*).

Mr. *Bain*, contra, contended that the defendant was entitled to 20*s.* only, the same as if the defendant had submitted to the demurrer within the eight days. The eight days were given to the defendant in which to set the demurrer down, and if he does not the defendant might himself have set it down, but as he did not, he can only have the ordinary 20*s.* He referred to *Smith's* Pr. 528 and 435.

Judgment. MR. TAYLOR, REFEREE IN CHAMBERS.—The defendant filed a demurrer on the 17th of December, 1870; a copy was served in compliance with a demand on the 23rd of December, and on the 26th of January, 1871, the plaintiff obtained an order to amend on *præcipe*, and amended the bill. This order did not in any way pro-

(*a*) 1 Cham. R. 82. (*b*) 6 U. C. L. J. 143
(*c*) 3 Cham. R. 97.

1871.

Weiss v. Rankin.

vide for paying the defendant's costs of the demurrer. The defendant having moved against the order, and the amendments made under it, an arrangement has been come to between the parties, and the only question submitted to me is, what costs is the plaintiff liable to pay to the defendant in respect of the demurrer?

The plaintiff contends that he is liable to pay only 20*s.*; while the defendant insists that the order to amend not having been taken out within the eight days allowed the plaintiff by Order 121, he is entitled to taxed costs. In support of his position the English Con. Order 14, Rule 14, (*a*), is cited. That Order provides that when a demurrer is not set down for argument within twelve days after the filing, and the plaintiff does not within such twelve days serve an order to amend, the demurrer is to be held sufficient to the same extent and for the same purposes, and the plaintiff is to pay to the demurring party the same costs as in the case of a demurrer to the whole bill allowed upon argument. Order 121 of the Orders of this Court, it is argued, has the same effect. I do not think it has.

Judgment.

Before June, 1868, as the Order of Court relating to demurrers stood, a defendant filing a demurrer could at once set it down, and with his notice of filing the demurrer serve notice of the argument. It is true a decision of the late V.C. *Esten* (*b*), was some check upon this, and had the effect of giving the plaintiff two days to consider the demurrer before the defendant could set it down, but, under the wording of the Order the defendant had strictly the right of so setting it down. To remedy this, and give the plaintiff a reasonable time for considering the demurrer, Order 121 was passed.

(*a*) Morgan's Acts and Orders. (*b*) Baldwin v. Borst, 1 Cham. R. 82.

1871.

Weiss v. Rankin.

The English Order 14, Rule 14 was promulgated only in 1845, and therefore is not in force here. I can find no prior Order like it, except the 14th of Lord *Coventry's* Orders (*a*). That Order after providing that the Registrar at the instance of the party demurring, shall, without any fee, put it into the paper of causes; goes on to enact "and if the *defendant who demurred* make no such instance to the Registrar within eight days after the demurrer is put into Court, the same without any motion, shall be disallowed of course, as put in for delay; and *the defendant* shall pay ordinary costs." The practice then, was in fact just the opposite to what it is now in England.

As the Orders of this Court are silent on the subject the practice must be governed by that which prevailed in England in 1837. In a foot note in *Smith's* Pr. (2nd Ed.), referring to Lord *Coventry's* Order, it is said, "but this is not the practice." The practice which obtained in 1837 was, that if the plaintiff considered the demurrer good, he might at any time before the demurrer was set down, submit to the same, and obtain as of course an order to amend his bill, which was made upon the terms of paying 20*s*. costs (*b*). This must be considered as the practice in force here, and as the demurrer in this case was not set down when the plaintiff took his order to amend he will pay to the defendant 20*s*.

Judgment.

Nothing was said as to costs of the application before me. I presume none are asked on either side.

(*a*) Beam. Orders, 77.

(*b*) Smith's Pr. (2nd ed.) 210.

1871.

McLennan v. Helps.

Foreign commission.

The Master cannot *ex parte* issue a certificate for a foreign commission.

[Court, February 9, 1871.]

This was an appeal from the Master at Stratford who, *ex parte* in a reference before him, issued a certificate to the plaintiff for a foreign commission.

Mr. *Cattanach*, for the appellant.—Before Order 221, allowing orders for commissions to issue on *præcipe* on the filing of the Master's certificate, was passed, the practice was to apply to the Master for a certificate, and then move in Chambers on notice: *Stephens* v. *Mears* (*a*). Now that an application in Chambers is not necessary, it is the more necessary that all parties shall be heard in the Master's office. The only redress, if the Master has made a mistake, is to appeal to the Court; and parties should not be driven to the appeal when the simpler and cheaper process of appearing in the Master's office would do as well. We are governed by the practice in force in England in June, 1857, and by our Statute Law; and the practice there, after 1845, was to make such orders only on notice: see *McHardy* v. *Hitchcock* (*b*), and *Gresley* on Evidence, pp. 88, 90, 112, 114. *McHardy* v. *Hitchcock* seems to imply that before 1845 an order for a foreign commission could be obtained *ex parte* in England. But this is not meant. The *ex parte* orders there referred to related to the examination of witnesses more than twenty miles distant from London, but resident in England, who could be examined before special examiners appointed by the Court; in fact officers of the Court. The case of a foreign commission was altogether different as it involved

Argument.

(*a*) 1 Cham. R. 200. (*b*) 21 Beav. 93.

1871.

Crombie v. Bell.

this affidavit before a special examiner, and was asked whether the persons named were present when a certain agreement (which was the foundation of the suit), was made. He declined to answer the questions on the ground that he was not bound to disclose the evidence he expected his witnesses to give at the hearing of the cause. The examiner (Mr. *Esten*), ruled in favour of the objection—from this ruling the defendant appealed.

Mr. *Bethune*, for the defendant.

Mr. *T. Moss*, contra.

Mr. *Bethune* contended that the defendant was entitled to the utmost discovery, and to have the advantage of the best evidence he could procure, no injury could accrue to the plaintiff by the answering of the questions sought to be put; there are frequent cases at law, where the allegation of a party's being a material witness is allowed to be contradicted: he cited *Chitty* on Evidence p. 77, and referred to *McMurray* v. *Grand Trunk*, *ante* 133.

Argument.

Mr. *Moss*, for the plaintiff. The contention on the other side is that on a motion to change the venue a party opposing the motion can be asked what evidence his witnesses can give; no such practice prevails, the principle is altogether the other way, the Court will not put the defendant in such a position. It may be that in the present case the witnesses were not present at the agreement, and yet nevertheless might be very material and necessary witnesses; it is opposed to all principle to investigate before hand what witnesses are going to prove. The only question on a motion to change venue is, where is it most convenient to try the case, the plaintiff pledges his oath to his statement, and that *primâ facie*, is conclusive for the present object—it cannot be that a judge is to enquire at this stage what can be

proved by witnesses and pronounce as its materiality— the analogy at Common Law is that an allegation of materiality is sufficient. The motion to change venue is only a preliminary proceeding, and the question is simply one of convenience, all the Court requires is a sufficient statement on oath to induce it to order a change: he cited *Mackenzie* v. *Hudson* (*a*). 1871. Crombie v. Bell.

Mr. *Bethune*, in reply, admitted that the he could not go into the particulars of what the witnesses could prove, but contended that he had a right to see whether the proposed evidence was likely to be material and to ask questions with that view. He argued that he was justified in treating the question as an unsettled one, and if the Court was against him and dismissed the appeal, it should be without costs.

MOWAT, V. C.—I think the more convenient and reasonable rule to lay down, will be that such a question is not under the circumstances admissible. Without holding that under no possible circumstances such a question can be put, I consider it safest in the case before me to hold that the question could not be put. I therefore dismiss the appeal, but without costs. Judgment.

JARDINE v. HOPE.

Costs—Ex parte application—Practice as to costs of abandoned motion—Costs of not proceeding to hearing according to notice.

An application for costs of not proceeding to hearing according to notice will not be granted *ex parte*. The practice discussed, *Armour* v. *Noble*, 8 Cham. R. 99, considered.

[February 25, 1871.]

Mr. *Monro* applied *ex parte* for an order for costs of not proceeding to hearing according to notice.

(*a*) 1 Dow. & Ry. 159

1871.

Jardine v. Hope.

MR. TAYLOR, REFEREE IN CHAMBERS.—The defendants apply for payment by the plaintiff of the costs occasioned by his having served notice of hearing for the last sittings at Hamilton, and then not proceeded with the cause. The application is made *ex parte*, and *Armour* v. *Noble* (*a*), is relied on as an authority for so moving.

On consideration of the matter I am not sure that the conclusion arrived at in that case was correct. It was decided upon the analogy of the practice which prevails in the Common Law Courts, of granting a rule for costs of not proceeding to trial, as of course without notice; but that practice seems to depend upon the express words of the Common Law Procedure Act, sec. 225. *Armour* v. *Noble* is also distinguishable from the present case, because there, a countermand was served and the defendant had notice not to appear in Court on the day named for hearing.

Judgment.

It is not by any means clear that the defendants are now entitled to ask for these costs. Where a party serving a petition or notice of motion made default on the return of it, if the person served desired to obtain the costs of an abandoned motion, it was in England necessary for him to apply for them not later than on the next seal day or on the next motion day: *Woodcock* v. *Oxford &c. Railway Co.* (*b*). Here the practice has, as I understand, always been that the party asking costs of an abandoned motion should mention it to the Court on the day for which the notice was given, and file, before the rising of the Court on that day, the notice of motion and an affidavit verifying it as the notice served upon him.

Our orders are silent as to the mode of proceeding to

(*a*) 8 Cham R. 99. (*b*) 17 Jur. 88.

obtain costs of the day on the plaintiff's default at the hearing, and I can find no reported case on the point. The only order relating to the plaintiff's default at the hearing is the 184th, which says that "if the cause is called on to be heard, and the plaintiff makes default, and by reason thereof the bill is dismissed, the dismissal is to be equivalent to a dismissal on the merits." To obtain an order thus dismissing the bill it is necessary for the defendant to appear before the Court on the day named for the hearing, and produce a regular affidavit of service of the notice on him: *Rigg* v. *Wall* (*a*).

1871.

Jardine v. Hope.

If the analogy of such an order, or of an order for costs of an abandoned motion, is to apply to obtaining costs of the day at the hearing, the defendant should have appeared during the Hamilton sittings and asked for them, and an application now, is too late. At all events the point is too doubtful a one for me to make an order *ex parte*.

Judgment.

HEENAN v. DEWAR.

Security on appealing—Staying proceedings.

The practice as to the perfecting of security to stay execution on appealing from this Court is different from the practice on appeals at law. No motion is necessary here to allow the security: the onus of moving against the security being on the party objecting to it.

On a motion for a stay of execution pending an appeal it is not necessary to give fourteen days notice. The ordinary notice is sufficient.

[March 2, 1871.]

The bill in this case had been dismissed with costs; the costs had been taxed at $168.16; on the 27th of

(*a*) 8 M. & C. 505.

1871. January, execution against the plaintiff's goods was issued, and had since been placed in the hands of the proper sheriff who was proceeding under the writ to collect the money.

Heenan v. Dewar.

The plaintiff, who desired to carry the cause to the Court of Error and Appeal, on the 10th February, filed a bond in the penalty of $970, conditioned for the payment of these costs, and on the same day served notice of this bond being filed, on the defendant's solicitors. He now applied for an order or fiat to the sheriff to stay proceedings under the execution.

Mr. *Paterson*, for the plaintiff, produced the certificate of the bond being filed.

Mr. *Cassells*, contra, objected that no application had been made for, and no order taken allowing the bond as sufficient. That the Orders of the Court shew that an allowance of the bond is necessary. Such is the practice on appeals from the Courts of Common Law: he referred to the Error and Appeal Act, sec. 16, Orders in Appeal, 6 and 7, and *Heward* v. *Heward* (*a*). He also objected that the fourteen days' notice should have been given. The amount of penalty should be fixed by the Court, and this could not be done unless some notice to allow the bond was made.

Argument.

Mr. *Paterson*, for plaintiff, referred to Error and Appeal, Orders No. 28; security was to be by bond and fourteen days notice of filing was to be given, but there is no order requiring any motion to allow the bond. A special application is only necessary to stay proceedings, and he now made such a motion, if the defendant were dissatisfied with the bond they should have moved against it.

(*a*) 2 Cham. R. 245.

1871.

Keenan v. Dewar.

MR. TAYLOR, REFEREE IN CHAMBERS.—The present is not a case in which the mere filing of a bond under sec. 15 of the Error and Appeal Act is sufficient. The decree appealed from directs the payment of costs, and that brings it within sub-sec. 4 of sec. 16 of the Act: *Heward* v. *Heward* (*a*).

The plaintiff objects that fourteen days notice of the present application has not been given, and that the bond filed has not been allowed by the Court, nor has any application for such allowance been made. I do not think either of these objections can prevail.

The practice as to the giving and perfecting of security is different according as the application is from a Common Law Court or the Court of Chancery. Sec. 15 of the Error and Appeal Act (Consol. Stat. U. C. ch. 13) says, "No application shall be allowed until the appellant has given proper security to the extent of $400, to the satisfaction of the Court from whose order, decree, or judgment, he is about to appeal, that he will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment or decree appealed from be affirmed." Judgment.

By sec. 16 (which was sec. 40 of the original Act 12 Vic. ch. 63), it is provided that upon the perfecting of such security, execution shall be stayed in the original cause except in four cases set out in that section, under the fourth of which (sub-sec. 1 of sec. 40 of the original act) the present case comes.

The 17th sec. provides "Where the security has been perfected and allowed, any judge of the Court appealed from may issue his fiat to the sheriff to whom any execution on the judgment or decree has issued, to stay the

(*a*) 2 Cham. R. 245.

1871. execution, and the execution shall be thereby stayed whether a levy has been made under it or not."

Heenan v. Dewar.

It is under this section that the present application is made.

In the statute nothing is said as to the mode in which the security is to be "perfected and allowed." By the orders of the Court of Error and Appeal, Nos. 3, 4, and 5, it is ordered that the security shall be personal and by bond; when for costs, in the sum of $400; and the form of bond is given in Order 5. Order 6 directs what amount of security is to be given where a stay of execution is sought, what recitals are to be inserted in the bond, and what the condition of it is to be. By Order 10, fourteen days notice, containing the particulars specified in the order, is to be given of the time and place at which application will be made to the Court appealed from, or a judge thereof, for allowance of the security. The 11th and 12th Orders point out the manner in which the allowance of the bond may be opposed, and the mode of endorsing the allowance of the bond in the event of its being allowed.

Judgment.

Turning to Order 28, I think it is evident from the language used, that those Orders, 10, 11, and 12, and the various provisions as to the allowance of the bond, can apply to appeals, from the Common Law Courts only. Order 28 is as follows, "In all applications from the Court of Chancery, all securities under the 40th sec. of the said act of the Provincial Parliament passed in the 12th year of the reign of Her present Majesty, ch. 63, shall be in the form of a bond, which, together with the affidavit of justification, shall be filed with the Registrar of the said Court, and notice thereof served on the respondent, his attorney, or agent; and the same shall stand allowed, unless the respondent shall within fourteen days after service of such notice move the said Court to

disallow the same. A special application shall be necessary to stay proceedings under the exceptions in the said section of the said act." 1871. Hernan v. Dewar.

The different mode of proceeding on an appeal from the Courts of Common Law and the Court of Chancery, is, I suppose, from analogy to the different modes of proceeding on giving security for costs in a suit in these Courts. At Common Law it is the duty of the person giving the security to bring the opposite party before the Court or a judge to have the security allowed (*a*), while in Chancery he has only to file his bond and give notice of having done so, throwing on the party who has obtained the order for security, the onus of moving against the bond, if he considers it imperfect in form or the sureties insufficient (*b*). It may be difficult to apply this Order 28 to the case of securities under the 1st and 3rd sub-secs. of sec. 16, but the language of the Order is, to my mind, quite conclusive that it is not necessary in Chancery to have an order allowing the bond, but that after the lapse of fourteen days from notice of filing, the appellant may, if no application is made to disallow the bond, move simply to stay proceedings. The difficulty in the other case, must be dealt with when it arises. Judgment.

Taking the view I do of these Orders, I must grant the present application.

(*a*) 2 Lush's Pr. 933; 2 Arch's Pr. 1408.

(*b*) 1 Daniel's Pr. 34, 35; 1 Smith's Pr. 2nd Ed. 559.

1871.

In re Toms, a Solicitor, in the matter of M. C. Cameron.

Solicitor—Taxation—Conduct of a solicitor—Proceedings instituted by Court.

Where an order for the delivery and taxation of bills of costs had been taken out on *præcipe* on the application of the administrator of the person who employed the solicitor, and the fact that the solicitor disputed the retainer by such person, was not brought to the notice of the Court on the issuing of the order, but it was established that the administrator did not know when taking out the order that the retainer was disputed: *Held*, that there was no suppression of a material fact on the part of the administrator and that the order was regular.

The Court will *sua sponte* where the circumstances appear to warrant it, take notice of the conduct of its solicitors, and investigate matters in which their acts seem open to suspicion.

Where witnesses directly contradict each other, the presumption is, not that one speaks falsely, but that one has forgotten the circumstances, unless the facts distinctly repel such an assumption. In investigating a charge instituted by the Court against a solicitor, and which if established would have proved of a very grave nature, the Court acted on the above principle and accepted the solicitor's explanation of the facts, although distinctly contradicted by the client.

[June and December, 1870.]

Statement. On the 23rd June, 1870, Mr. *Spencer* moved before *Spragge*, C., to set aside an order made *ex parte* by the Secretary for the delivery by *M. C. Cameron* and taxation of certain bills of costs.

He contended that a motion should have been made in Chambers on notice, and that the order was irregularly taken out on *præcipe*, that Mr. *Cameron* was not the solicitor in the cause; that he did not then practice in the Court of Chancery, and had sent the client *Chapman* to another solicitor, Mr. *Toms*, as a professional friend, and not as an agent; that, at any rate, Mr. *Cameron* could not be considered on any grounds the solicitor of the present applicant *Cunning-*

ham (the administrator of *Chapman*). No bill of costs had ever been applied for from Mr. *Cameron*. *Cameron* had been asked by *Cunningham* to obtain a bill of costs from *Toms*, which itself shews that *Cunningham* did not consider *Cameron* his solicitor. *Cameron* could not have maintained an action at law for these costs, and he is not estopped now from shewing the facts and disputing the retainer. *Cameron's* name was not on the record either as solicitor or agent, and the suit was not conducted by him: the suit was conducted by Mr. *Toms*, and in his own name. The order was also irregular on the ground that material facts were suppressed and not brought to the notice of the Court when the order was taken; namely, the fact that Mr. *Cameron* denied the retainer. He cited *Re Eldridge* (*a*), *Re Gabriel* (*b*), *Re Winterbottom* (*c*), *Re Wolfe* (*d*), *De Feuchers* v. *Dawes* (*e*), *Re Boultbee* (*f*), *Re Moss* (*g*), *Holland* v. *Grogan* (*h*).

1871.

In re Toms.

Argument.

Mr. *Thomas Moss*, contra, contended that the practice was plain, and was laid down in *Ayckburne's* Practice, 671. None of the objections to the regularity of the order had been sustained. The relation of solicitor and client was established, and not denied by the affidavit of *Cameron* himself: he does not state in his affidavit that he did not accept the retainer. Mr. *Toms* admits that his instructions were received from *Cameron*. *Toms* did not ask for disbursements, whereas *Cameron* did, and gave a receipt worded, "received on account of costs." The sum deposited for disbursements is not explained either by *Cameron* or by *Toms*. *Cameron* in a letter speaks of *Toms* as "my Chancery agent." Mr. *Garrow*, *Cameron's* partner, in his letters, and Mr. *Cameron*, in a

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(*a*) 12 Beav. 387.
(*b*) 10 Beav. 45.
(*c*) 15 Beav. 80.
(*d*) 14 Beav. 227.
(*e*) 11 Beav. 46.
(*f*) 2 Cham. R. 58.
(*g*) 17 Beav. 59.
(*h*) 8 Beav. 124.

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letter of November, 1869, speaks of himself and Mr. *Toms* in connection with the suit as "we" and "us."

Mr. *Spencer*, in reply, contended that whatever the case might be as to *Chapman*, there was nothing to fix Mr. *Cameron* with liability as solicitor for *Cunningham*.

Mr. *Cameron* made the following affidavit:—

"I, *Malcolm Collier Cameron*, say:—

"1. I am the solicitor above named.

"2. That on the 22nd of this month I was served with the annexed order.

"3. That the service of said order on me was the first notice I had of any proceedings being had or taken in this matter, and that I never had any knowledge or notice of any kind that such proceedings were being had against me, or were intended to be taken until I received said order.

"4. That neither the said *Chester Chapman*, in his life time, or the said *R. S. Cuningham*, as his administrator, ever employed me as their solicitor in the case in this Court mentioned in said order of *Chapman* v. *McCrae*: that I was not solicitor, and did not act as solicitor in the said suit either for said *Chapman* or said *Cunningham*.

"5. That the only connection I had with any suit of *Chapman* v. *McCrae* was as the attorney-at-law of *Chapman* in an action brought by him against *McCrae* and one *Dubrey*, and that out of that suit at law said suit in Chancery arose.

"6. That said suit in Chancery was based on the judgment at law, and said suit at law was brought to

enforce payment of said judgment out of certain lands of *McCrae* alleged to have been fraudulently conveyed by said *McCrae* to his son.

7. "That said *Chapman* desired me to take charge of said proceedings in Chancery, but I told him that I did not practise in the Court of Chancery—and I did not then do so—but that I could place the case in the hands of *Isaac Francis Toms*, one of the practising solicitors of the Court, who would conduct the case for him, to which he agreed.

"8. That thereupon the said suit was instituted and carried on by the said *Toms* as the solicitor of the said *Chapman*, and I had no interest whatever in the said suit or in any of the fees thereof, and no connection whatever therewith thereafter as solicitor for said *Chapman* or said *Cunningham*.

"9. I never received, and never expected to receive, one cent of the moneys arising out of said suit, or of the costs thereof, in any capacity whatever.

"10. That the whole business of the said suit was conducted and carried on by said *Toms* as the solicitor of said *Cunningham*, and not by me; and the said *Cunningham* and said *Chapman* dealt with said *Toms* as solicitor in the cause.

"11. Said *Toms* collected whatever money was obtained in said Chancery suit, and the same passed through his hands as such solicitor.

"12. That at the request of said *Cunningham* I obtained from said *Toms* $300 of the moneys arising out of said proceedings, and paid the same to *Cunningham*.

"13. That it is not true that said *Cunningham*, or any one else, demanded a bill of costs from me; but

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said *Cunningham*, through his attorney *L. C. Moore*, requested me to get from said *Toms* the bill of costs in said cause, and also requested me to apply to the Court for such bill, and to compel said *Toms*, to pay over said money, as *Cunningham* contended said *Toms* retained more money for costs than he should have done; but I declined to act for *Cunningham* in making such application, and never heard anything more of the matter until served with said order.

"14. I have no bill of costs in said suit, or in any other suit whatever in this Court, against the said *Cunningham* or said *Chapman*, and have no money or papers belonging to either of them.

"15. Said *Cunningham* and no one for him ever demanded of me a bill of costs in any suit, or any statement of account, in any matter of business that I ever transacted either for him or *Chapman*, nor did said *Chapman* do so in his life time.

"[Sworn, 28th April, 1870.]"

Mr. *Toms* made the following affidavit:—

"I, *Isaac Francis Toms*, of the town of Goderich, say:—

"1. I was the solicitor for the plaintiff upon the record in the cause in this Court of *Chapman* v. *McCrae*, referred to in the order made in this cause, dated 16th April instant.

"2. I received instructions in the said suit from the above named *M. C. Cameron*, who did not then, I believe, practise in this Court, but subsequently the plaintiff in said suit dealt with me personally as his solicitor in said suit.

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"3. I did not conduct the said suit as agent for, or upon agency terms, for said *Cameron*, nor had the said *Cameron* any interest in said suit that I am aware of.

"4. After the death of the plaintiff in the said suit his administrator, *Robert S. Cunningham*, upon whose behalf the present application has been made, retained me as his solicitor to revive the said suit, and to carry the same to completion, which I accordingly did as the solicitor of said *Cunningham*.

"[Sworn, 30th April, 1870.]"

Cunningham, the client, made the following affidavit:

"I, *Robert Sandfield Cunningham*, of the township of Brant, in the County of Bruce, yeoman, make oath and say:—

"1. I am the administrator of *Chester Chapman*, the plaintiff in the suit of *Chapman* v. *McCrae*, referred to in the order made herein on the 16th day of April last, and the person upon whose application the said order issued.

"2. The said *Chester Chapman* departed this life sometime early in the spring of the year 1868, intestate, and shortly after his death I obtained from the Surrogate Court of the County of Huron letters of administration to his estate, for the purpose of enabling me to prosecute the said suit of *Chapman* v. *McCrae*, and the said suit was revived in my name as such administrator of the estate of the said *Chapman*.

"3. The said suit was instituted by the said *Chester Chapman* in the beginning of the year 1865, and I believe the instructions for the said suit were given to the above named *M. C. Cameron* by the said *Chester*

1871. In re Toms. *Chapman*, who, I believe, always considered and treated the said *Cameron* as his solicitor therein; and I further believe that the said *Chester Chapman* never employed or instructed the said *M. C. Cameron* to employ Mr. *Toms*, or any other solicitor, to prosecute or conduct the said suit as the solicitor of the said *Chapman*, and that he always looked to the said *M. C. Cameron* alone for the due prosecution and conduct of the same.

"4. The paper writings now shewn to me, and marked 'D,' 'E,' and 'F,' respectively, were found by me among the papers of the said *Chapman* after his decease.

"5. 'D' and 'F' are in the handwriting of said *Cameron*. 'E' is in the handwriting of *H. P. O'Connor*, who was at the date of the said paper an articled clerk in the office of the said *Cameron*.

"6. The said common law suit of *Chapman* v. *McCrae* and *Dubrey*, referred to in the affidavit of said *Cameron*, made herein on 23rd April last, was concluded long before the date of any of the said writings, and the costs thereof paid to the said *Cameron*.

"7. After the death of *Chapman* and the revivor of the suit in my name, I continued to regard the said *Cameron* as my solicitor in the said suit, and I never employed or instructed *Cameron* to employ Mr. *Toms*, or any other solicitor, to continue the prosecution of the said suit as my solicitor; on the contrary, I always considered, and still consider, the said *Cameron* as my solicitor, as he was the said *Chapman's* solicitor in the said suit.

"8. Said *Cameron* acted, in employing said *Toms* to conduct said suit, solely on his own behalf, and not in any way, as I believe, in pursuance of instructions from, or with the authority of, the said *Chapman* during his

lifetime, or from me, or with my authority after his decease; and believing, as I did, from the paper writings hereinafter referred to, that the said *Toms* was acting merely as the agent of said *Cameron*, I never regarded him in any other light, and I did not recognize or treat with him as the solicitor of the said *Chapman*, or as my solicitor in the said suit. My communications with reference to the said suit were made to and with said *Cameron*, or the firm of *Cameron & Garrow* of which he is now a member.

"9. On or about the—day of—last I received from said firm of *Cameron & Garrow*, in reply to a letter from me asking for information as to the progress of the suit, the letter now shewn to me, and marked G, which letter is in the handwriting of Mr. *Garrow*, the partner of the said *Cameron*, and sometime in December last said *Cameron* gave me the sum of $200, which he said was on account of said suit.

"10. I have not, nor to the best of my knowledge, information, and belief, has any one on my behalf, received any other or further sum on account of the said suit.

"11. I am informed by my present solicitor, and believe, that two cheques have been issued by the Court in this suit, payable to my order, the one for $710, and the other for $13; and that the said cheques have been returned as paid, but I say that I never endorsed, or authorized any person or persons to endorse or sign my name on the said cheques.

"12. I have repeatedly applied to *M. C. Cameron* to render me his bill of costs in the said suit, but though he has hitherto neglected to do so, he never informed me that he was not the solicitor for said *Chapman* and myself in said suit, and he never gave me any reason to

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believe that he did not consider himself such, nor had I any intimation or knowledge of his said contention until I received a copy of his said affidavit filed herein.

"13. I firmly believe that the sums of $80 and $25 mentioned in the hereinbefore mentioned paper writings 'D' and 'E' were paid by said *Chapman* to *Cameron* on account of his costs in said Chancery suit of *Chapman* v. *McCrae*, and that if said *Cameron* is not ordered to account to me as the solicitor in the said suit the same will be wholly lost.

"14. The proceeds of said suit, less the proper costs thereof, belong to me as such administrator of the estate of said *Chapman*, and I am threatened with proceedings by the representatives of the said *Chapman* to obtain from me an account of the same, and I am unable, without obtaining a bill of costs and account of the said moneys from *Cameron*, to duly account to them for the same.

"15. The said *Toms* is a person of no means, and is wholly unable to meet any liability in respect of the said moneys, as I am informed and believe.

"16. That the writing marked 'H' is of the proper handwriting of said *Cameron*.

"17. That any communication I may ever have had with said *Toms*, in relation to said suit, was made to and with him simply as the agent of *Cameron*.

"18. Paper marked 'I' was signed by *Chapman* in his lifetime, a few days before his death, and shews the relation existing between *Cameron* and said *Chapman* as they were then regarded.

"[Sworn, 14th May, 1870.]"

"H." 1871.

"GODERICH, 19*th November*, 1869. In re Toms.

"R. S. CUNNINGHAM,

"*Walkerton.*

"DEAR SIR.—All the money I got from *Toms* is $300. He has retained the whole of the balance for his costs. Out of this $300 I have to retain the costs of the suit you brought against *Chapman*, and the costs in *Chapman* against the executors. You appear to have two claims against *Chapman;* if so, there will not be enough to cover your claim. I will see *Toms*, and see how he makes up the amount, and only pays us $300.

"Yours,

"M. C. CAMERON."

"I."

"$156.02.

"To M. C. CAMERON, Esq.,

"*Goderich.*

"Pay *Robert S. Cunningham*, or order, the sum of one hundred fifty-six dollars and two cents, and deduct the same from the proceeds of the judgment in your hands, or from any other moneys or securities which you hold on my behalf, or may hereafter hold.

"CHESTER his × mark CHAPMAN.

Witness { "GEO. CLARKE, M. D. / "GEO. GORDON MARTIN."

THE CHANCELLOR.—I think the proper conclusion from the whole of the evidence is, that Mr. *Cameron* did accept *Chapman's* retainer of him as solicitor. Indeed from his own account of what passed between him and *Chapman*, *Chapman* would naturally understand that he did so. His subsequent conduct and the correspondence lead to the same conclusion. I do not agree that he ceased to be solicitor after the death of *Chapman*, there was no change; and the letter of November, 1869, is in Judgment.

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favor of the same relation continuing between them. I say this with my reasons at the close of the argument. Further upon the point of regularity and upon the suppression of material facts I have referred to the authorities cited. They shew that an order of course for delivery of bills of costs and for taxation is regular and proper, unless there be something to take the case out of the ordinary rule. They shew also (the purpose for which they were cited) that where any fact is suppressed by the client, upon which if disclosed it would have been proper for the officer issuing the order of course to exercise his discretion whether to issue an order of course or to put the client to a special application, the order will be discharged. The fact relied upon as suppressed here is that Mr. *Cameron* denied that he was solicitor for *Chapman* in his life-time or for *Cunningham* since the death of *Chapman*; and if *Cunningham* knew when he applied for his order that *Cameron* disputed his

Judgment.

retainer, it was a fact which he was wrong in suppressing, unless he did know it, there was no suppression. He denies especially that *Cameron* gave him any reason to believe that he did not consider himself solicitor for *Chapman* himself, or that he had any intimation or knowledge of his contention that he was not such solicitor until he read a copy of Mr. *Cameron's* affidavit filed upon this application, and I may add that the letters from Mr. *Cameron's* office found by *Cunningham* among *Chapman's* papers were calculated to lead *Cunningham* to the belief that *Cameron* was, and that he avowed himself to be, solicitor for *Chapman*. I must therefore refuse the application, and it must be with costs.

The affidavit of *Cunningham* has this paragraph: "I am informed by my present solicitor, and I believe that two cheques have been issued by this Court in this suit payable to my order, the one for the sum of $710, and the other for the sum of $13, and that the said cheques

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have been returned as paid, but I say that I never endorsed or authorized any person or persons to endorse or sign my name on the said cheques. I have sent for these cheques and I find the name *R. S. Cunningham* endorsed upon each of them. I find further from the ledger clerk that the cheques after being made and payable to *R. S. Cunningham* were handed over by him (the officer) to the Toronto agent of Mr. *Isaac Francis Toms*, a solicitor of this Court, in whose name the suit was conducted; and I have called upon the agent to make affidavit as to what he did with the cheques, and this he has done, and from his affidavit it appears that the cheques payable to *Cunningham* were transmitted from his office to Mr. *Toms* and that they had since been cashed."

Judgment.

We have then the cheques traced to Mr. *Toms*. He could receive them properly for no other purpose than to hand them to his client. It is proper that Mr. *Toms* should be called upon to shew cause why he should not answer to the allegations contained in the paragraph of Mr. *Cunningham's* affidavit to which I have referred, and in the affidavit of his Toronto agent. An order will issue accordingly.

I entertain no doubt as to the propriety, and indeed the duty of the Court to call upon the solicitor whose conduct appears to the Court to have been improper to answer in respect of that which, is *primâ facie* at least, misconduct, although the parties to the suit may make no application against the solicitor: *Goodwyn* v. *Gosnell* (*a*), before Sir *J. Knight Bruce* was a case of that character. I cannot do better than quote the language of the learned Judge, "Not one of the parties interested has made any application against him (the solicitor) except by the institution of this suit. As it is,

(*a*) 2 Coll. 460.

1871. In re Toms. however, unfortunately the case has come before the Court, it is now judicially before one, and my understanding of the duty, which I owe to the profession, and to society, prohibits me from treating it as not containing anything beyond mere matter of civil litigation. *Wheatley* v. *Basters*, *In Re Collins* (*a*), before the Lords Justices *Knight Bruce* and *Turner*, was another case of the same nature. The Lord Justice *Knight Bruce* observes at the close of it, "It should be known that however personally painful it may have been to us to perform this duty, it has not been prompted or moved by anyone but ourselves. We ordered the proceedings from a sense of public duty, and they are directly and solely attributable to us."

Mr. *Toms*, in answer to the order issued in accordance with the instructions contained in the foregoing judgment, filed the following affidavit:—

Judgment.

Affidavit of *Isaac F. Toms.*

"I, *Isaac Francis Toms*, of the Town of Goderich in the County of Huron, Esq., make oath and say:—

"1. I am the solicitor above named.

"2. In reference to the 11th paragraph of a certain affidavit made by one *R. S. Cunningham* in a matter pending in this Court of 'In the matter of *Malcolm Collier Cameron*,' one of the solicitors of the Court, I say as follows:—

"I received the cheques in said affidavit referred to, and obtained payment of the same as I was authorized to do by said *R. S. Cunningham.*

"I was the solicitor upon the record for the plaintiff in the suit of *Chapman* v. *McCrae* in said affidavit men-

(*a*) 7 D. M. & G. 261, 559, 562.

tioned, and I have from the original plaintiff (since deceased) authority in writing to do all acts and sign all papers necessary to obtain the money in question in said suit.

"On 22nd May, 1869, I wrote to said *Cunningham* a letter which is copied in my letter book as follows:—

"Goderich, May 22nd, 1869.

"*Chapman* v. *McCrae.*

"DEAR SIR.—I hope to soon to have the money in this. On looking over my docket I find I am out of pocket a large amount. I have an agreement from *Chapman* to pay all extra costs, and I thought I had one from you, but I don't find any. Please sign the memorandum below, and return it to me at once.

"*Lowry* v. *Cook.*

Statement.

"I will push this ahead.

"Yours truly,

"R. S. CUNNINGHAM. J. F. TOMS."

"In Chancery.

"*Chapman* v. *McCrae.*

"I hereby agree to pay Mr. *Toms* the costs already incurred herein and future costs as between solicitor and client, and I authorize him to take such proceedings, sign all papers, cheques or other documents necessary to obtain the amount of judgment in the suit.

"May 2nd, 1869."

"On 27th May, 1869, said *Cunningham* came to my office on a matter of business, independently of said suit of *Chapman* v. *McCrae*, and he then gave me the said letter with the memorandum at the foot thereof, duly signed by him, and it was upon such authority that I obtained payment of the said cheques.

1871. In re Toms. "In early part of June, 1869, my partnership with my former law partner having been dissolved, and the papers in the office being in a state of confusion, they were placed on a file together, and sorted by my clerk, and I have lately gone over all the papers in my office personally, but I have been unable to find the said authority, and I believe the same has either been mislaid or lost.

"At the time I obtained payment of the said cheques said *Cunningham* was indebted to me in the sum of $200, independently of the costs of the said suit of *Chapman* v. *McCrae*, being the costs of a certain suit in this Court of *Lowry* v. *Cook* which he had become liable to pay to me, and which he has lately paid.

"After deducting the amount paid by me to said *Cameron* from the amount received by me upon said cheques, I still claim that there is a small sum due to me in respect of the costs of the said suit of *Chapman* v. *McCrae*.

Statement.

"[Sworn 12th November, 1870.]"

On this affidavit Mr. *Bethune* moved that the order be discharged. Mr. *John Hoskin*, by the direction of the Court, appeared in support of the order, and after hearing counsel respectively, the Chancellor gave Mr. *Toms*, if he desired it, the opportunity of cross-examining *Cunningham* on the affidavit made by him in open Court. On the 20th December, Mr. *Toms* and Mr. *Cunningham* appeared in Court, when the following evidence was taken:

20th December, 1870.

Cunningham sworn, says:—

"The signature to affidavit marked "A" is mine. I swore to that affidavit. I remember the paragraph therein referring to indorsement of cheques. I never

endorsed the cheques "B" and "C." I have no letter from *Toms*, dated 22nd May, 1869. I never saw a letter containing the words set forth in Mr. *Tom's* affidavit, nor did I ever sign a memorandum of the nature stated in that affidavit." 1871. In re Toms.

Cross-examined.—"Letter marked 'I,' I think I received this present or latter end of last year. I imagined the money referred to therein was that coming from Chancery. I did not go to see Mr. *Toms* in reference thereto that I recollect. I was not at all astonished that Mr. *Toms* got the money from the Court. I knew he was agent of Mr. *Cameron*. I can't state how long after I received notice of Mr. *Tom's* receiving the money I went to see Mr. *Cameron*. I cannot swear positively that I never received any other letter than the three now produced; but I do not believe I did. I had dealings with Mr. *Reid* to the amount of $1200 in reference to mortgages. I do not recollect getting Mr. *Toms* to enclose $400 to Mr. *Reid*." Statement.

(On hearing letter read, witness states): "I now recollect the transaction. I had forgotten it until the letter brought it to my recollection. The reason I employed Mr. *Toms* to write the letter was, I suppose, that I got him to figure up the balance. I can't say I signed the letter; very likely I got him to sign it for me. I can't remember anything else that took place on the occasion of writing this letter to *Reid*. Lucknow, where I resided in May, 1869, is twenty-two miles from Goderich. Don't recollect what brought me into Goderich the day the letter was written. My memory is pretty good generally. I thought the transaction with *Reid* settled, so I did not care to think anything more about it, I will not swear that no other business took place on the day the letter was written to Mr. *Reid*, but I do not recollect anything having taken place. I was frequently in Mr. *Tom's* office in reference to a suit he

1871. In re Toms. was carrying on for a brother-in-law of mine. I swear positively I never signed a paper authorizing Mr. *Toms* to sign my name to cheques. A letter on a subject of so much importance as I considered the matter to be to me as that said to have been sent to me, if received, I would certainly have remembered it. The purport of the letter, as I understood it, is to authorize Mr. *Toms* to sign my name to cheques. I did not know it was necessary to give Mr. *Toms* authority to draw the money; I certainly expected it would come to me, and that it would come through Mr. *Cameron*; I expected the amount coming would be about $1000; it turned out to be less, I think. I think I wrote to Mr. *Cameron* before going to see him in reference to the receipt of the money by him. I did not tell *Toms* to get the money, nor did I give Mr. *Cameron* any authority to receive it. He was my solicitor; I supposed he would get it in that capacity."

Statement. Re-examined.—"I was not aware what course it was necessary to adopt to obtain money out of the Court of Chancery. The first I heard of the money having been paid out for me was from my solicitor in Walkerton. My reason for being positive that I never saw the letter from Mr. *Toms* asking me to sign authority to draw money is, that I looked to Mr. *Cameron* to act for me, and had such a proposition been made to me I would have been surprised at the suggestion, and would have been sure to recollect it."

To Mr. *Bethune*.—"I have written to Mr. *Toms* several times, not very often Mr. *Cameron* told me *Toms* was acting in the Chancery suit as his agent."

Mr. *Toms* examined:—"I made an affidavit in this matter, that affidavit is true. The original of letter marked 'K' was sent by me to *Cunningham*: I think by mail, and was returned to me by *Cunningham* personally the same day I wrote the letter to Mr. *Reid* for

Cunningham. On the same day I drew an affidavit for *Cunningham* as to the indebtedness of the estate of *Chapman* to *Cunningham*. The letter marked 'I' was sent by me to *Cunningham* the same day, or soon after I think, that I received the money for *Cunningham*. *Cunningham* spoke to me shortly after writing letter 'I.' *Cunningham* owed me money for costs, about $500, in *Chapman's* matters, and over $200 in another suit. The balance I paid to Mr. *Cameron*, after deducting the $500 in *Chapman's* matter; the other suit was not calculated. I have searched my office thoroughly for the original of letter 'K,' but have failed to find it." 1871. In re Toms.

Cross-examined.—"I wrote the words '*Rob. S. Cunningham*' on both cheques; these words are very dissimilar from my own signature, and unlike one another. I had no signature of *Cunningham's* by me when I endorsed the cheques."

Statement.

To the Court.—"I did not write *Cunningham's* name on the cheques so as to imitate his signature. I cannot tell why I did not put by procuration, or anything indicating that the signature was by procuration. I never do so when I am thus authorized. When he came to my office on the 27th May, the authority was already signed; I suppose by *Cunningham*."

Mr. *J. Hoskin*, who appeared by the direction of the Court to conduct the proceedings:—The question at issue is narrowed to a very simple one; the simple point, of whether Mr. *Toms* was, or was not authorized to sign the cheques in question. It is very unfortunate that the authorization is not forthcoming.

Mr. *Bethune*, for Mr. *Toms*, admitted the propriety of the proceedings, and did not on his own or his client's behalf object or complain of it; it was beneficial to the profession that the Court should initiate such proceed-

1871. In re Toms.

ings. As to the merits, he contended that the weight of evidence was in favor of the authority having been given by *Cunningham* to Mr. *Toms; Cunningham* may have forgotten the circumstance, as he evidently had other matters, which must have been of importance to him which took place on the same day. Mr. *Bethune* also dwelt on the fact of the letter, of which a copy or impression was in the letter-book of *Toms* in its proper place as to date, being evidently written and sent to *Cunningham*, enclosing the necessary authorization to receive the money.

SPRAGGE, C.—I cannot, upon the evidence before me, convict Mr. *Toms* of having put the name of *Cunningham* to the cheques without authority. His doing so would amount to forgery. Still he had conducted the business so irregularly as to have given rise to grave suspicion; and whilst thinking that the case does not call for further proceedings on the part of the Court, I will not give Mr. *Toms* his costs. [Mr. *Bethune* disclaimed any intention of asking for costs.] Mr. *Hoskin's* costs are to be paid out of the Suitor's Fee Fund.

Judgment.

DICKSON V. AVERY.

Appeal from Master's Report.

Held, overruling *McQueen* v. *McQueen ante* Vol. II, page 471, that on an application for leave to appeal from the Master's report, besides accounting for the delay, it is necessary that the party appealing should make out a *primâ facie* case for appeal.

[January 31, 1871.]

Mr. *Lash* moved on part of the plaintiff for leave to set this cause down by way of appeal from the report of the Master at Brantford, notwithstanding the confirma-

tion of the report. The appeal had been filed on the 8th December last. 1871.

Dickson v. Avery.

Mr. *Lash*.—The report was dated 25th November last, but it had not been filed until 8th December. On the 6th December plaintiff's solicitor searched for, and found no report filed; he then took out a duplicate report and filed it on the 21st December, thinking no other report had been filed, in this he acted in good faith; and under these circumstances it would be reasonable that he should be allowed to appeal, he accounted sufficiently for the delay, which under *McQueen* v. *McQueen* (*a*), was all that was necessary.

Mr. *S. H. Blake*, contra. Two things are necessary to be shewn on a motion like the present:—1st, that there has been no unreasonable delay, and 2nd, that there are probable grounds of appeal. The Secretary had held otherwise in *McQueen* v. *McQueen*, but the correct rule is as was held in *Coates* v. *McGlashan* (*b*.)

STRONG, V. C.—On a motion like the present I am of opinion that it is necessary to shew a probable ground of appeal. I can not subscribe to the rule laid down in *McQueen* v. *McQueen*, that it is only necessary to account for the delay. The Judge should look at the facts and exercise his judgment in the case, not, certainly as if he had to dispose of it or finally decide it, but to the extent of ascertaining if there exists any reasonable or probable grounds of appeal. I am averse to shutting any party out from the benefit of an appeal if he desires it, and as here the plaintiff appears to have acted in good faith not knowing the report to have been filed, I will enlarge the application to enable him to make, if he can, such *primâ facie* case, as he may have been misled by *McQueen* v. *McQueen*. Judgment.

(*a*) 2 Ch. Rep. 471. (*b*) 2 Cham. Rep. 218.

1871. Dickson v. Avery. On the application being renewed the plaintiff was let in to appeal on payment of costs.

DEWAR v. ORR.

DEWAR v. SPARLING.

Solicitor, how far he binds his client by an arrangement made without instructions—Affidavits.

An agreement entered into by a solicitor that his client's suit should abide the event of a certain other suit by the same plaintiff against another party, such agreement being made without instructions from the client, who afterwards repudiated it, *held*, not to be binding on the client.

An affidavit, in answer to affidavits filed in reply, filed after an enlargement of the motion, was held regularly filed, and allowed to be read, the Court offering to give the other party time to reply to it, if he required to do so.

[COURT, March 1, 1870.]

Statement. The plaintiff had a judgment against two parties jointly, and when he sought to enforce it, found that each party had conveyed away his real estate by conveyances which the plaintiff, alleging to be fraudulent, sought to impeach, and he filed separate bills against each. In the course of the proceedings an arrangement was entered into between the plaintiff's solicitor and the solicitor of the defendant in one suit, that such defendant's suit should abide the event of the other suit, the first suit was carried to hearing, and the other was not set down to be heard; the plaintiff obtained a decree in his favor in the first suit. It appeared that the client of the defendant's solicitor had not sanctioned this arrangement, although this fact was not known to the plaintiff's solicitor, and such client afterwards repudiated the arrangement; the plaintiff's solicitor in the meantime and unawares, it would seem, of the position taken by the client, filed a petition to have a similar decree made to what had been made in the first suit.

The agreement was contained in the following correspondence between the solicitors for the respective parties:— 1871. Dewar v. Orr.

"Toronto, Oct. 22, 1870.

"*Dewar* v. *Orr.*

"DEAR SIRS.—As your clerk requested, we postponed the appointment before Secretary till 11 o'clock, Monday, and will, if you do not consent to this case being decided by the other, as proposed, at once give you notice and set it down also. We have only waited for your answer, and suppose you will have seen Mr. *Boulton*, and decided to-day.

"Yours,

"PATTERSON, BEATTY & HAMILTON.

"Messrs. *Morrison & Wells.*"

"Toronto, 26th Oct., 1870.

"*Dewar* v. *Sparling.* Statement.

"*Dewar* v. *Orr.*

"DEAR SIRS.—We are content that the latter case shall abide by the result of the former, and that the same decree shall be made in both. This is upon the understanding that if we desire to rehear or appeal, the same arrangement shall continue, and that to the end of the proceedings, the latter case shall stand or fall by the former.

"Yours truly,

"MORRISON & WELLS.

"Messrs. *Patterson, Beaty & Hamilton,*
"Barristers, &c., Toronto."

Mr. *J. C. Hamilton*, in support of the petition.

Mr. *S. H. Blake*, contra.

A preliminary objection was taken by Mr. *Hamilton* to the reading of an affidavit which had been filed since

1871. Dewar v. Orr.

the motion was first spoken to, and after an enlargement had been granted. V. C. *Strong*, before whom the petition was heard, overruled this objection, offering Mr. *Hamilton* time to reply to the affidavit if he deemed it necessary. Mr. *Hamilton* proceeded with the argument, citing *Bailey* v. *Bailey* (*a*).

Mr. *S. H. Blake* relied on *Swinfen* v. *Swinfen* (*b*), and contended that the case cited, *Bailey* v. *Bailey*, did not apply.

Mr. *Hamilton*, in reply, argued against the application of *Swinfen* v. *Swinfen*. There the client had at once and promptly repudiated the compromise made by Sir *Frederick Thesiger*, who was counsel in the cause, and had made the compromise without consultation with the solicitor, here the arrangement was with the solicitor, and there was no repudiation until the plaintiffs had obtained a favorable decree in the other suit, if the result had been otherwise the defendant would have held the plaintiff to the terms of the agreement, and he would have considered himself bound by them.

Judgment.

STRONG, V. C.—I do not think it was competent for the solicitor simply, in virtue of his retainer, to make such a bargain or compromise as that his client's case should depend on the result of another case, in which the circumstances might be quite different. There appears to be nothing in common to the two cases, except the joint indebtedness of the respective defendants, beyond that, the cases are, or may be quite different, in one the transaction sought to be impeached might be altogether fraudulent, in the other founded on the utmost good faith. I shall dismiss the petition, the only question is as to the costs.

Mr. *Hamilton* urged that it was necessary for him to

(*a*) 2 Cham. R. 58. (*b*) 20 Beav. 549.

file the petition. He assumed, very naturally, he contended, that the solicitor for defendants had authority to enter into the arrangement made, he had not heard of the repudiation of the agreement by the client until after the petition was filed, and he asked for costs.

THE VICE CHANCELLOR.—It is for these reasons I do not give costs against the plaintiff, otherwise I should have had to dismiss the petition with costs. The petition must be dismissed, but without costs.

STREET v. DOLAN.

Parties—Foreclosure.

In a foreclosure suit, the mortgagor being dead, one of his heirs-at-law, who was originally a defendant, appeared from the affidavit filed to obtain service by publication to be dead, and the bill was thereupon amended by striking him out. The foreclosure was completed as against the other defendants, and after decree (on some objection to the title, by an intended purchaser, arising) a petition was filed by the plaintiff praying for an order foreclosing such party, and another party to whom one of the female defendants had been married to, and parted from, some fifteen years previously, and who had not since been heard of. The Referee refused the application.

[March 2, 1871.]

Statement.

The mortgagor having died, the mortgagee, the plaintiff, filed his bill for foreclosure, making the widow and heirs of the mortgagor parties. In the bill it was alleged that *Michael Dolan*, one of the sons of the mortgagor, was dead. A decree was made in due course, and a general order of foreclosure had been obtained.

The plaintiff now presented a petition alleging that the evidence of *Michael's* death was not conclusive, and further, that since the general order was obtained, he has discovered that *Bridget Dolan*, one of the mortgagor's daughters (made a defendant by that name) was mar-

1871. Street v. Dolan.

ried about fifteen years ago to a man named *Denis Meehan*, who left her a few months after the marriage. In correspondence which had passed between the plaintiff's solicitor and the family, *Bridget* had never been spoken of as married, and letters written by her were signed by her maiden name. The plaintiff prayed an order debarring and foreclosing *Michael Dolan* and *Denis Meehan*, either at once or after such advertising as may be thought proper.

Mr. *W. Fitzgerald*, for the application, cited *Re Hare, Carpenter* v. *Kelly* (*a*).

MR. TAYLOR, REFEREE IN CHAMBERS.—I do not see how such an order as is asked can be granted. Neither *Michael Dolan* nor *Denis Meehan* are parties, and I know of no order of Court which would warrant my making them parties. Order 438, which provides for making part owners of the equity of redemption, parties in the Master's office, does not apply. The suit is not now in the Master's office; the final order has been made, and the suit closed.

Judgment.

As to *Michael Dolan*, it is stated in the bill that he is dead, and I cannot make an order to advertise or foreclose a man who, on the face of the pleadings, is alleged to be dead. An amendment of the bill would be necessary, and the bill cannot be amended after decree (*b*). Besides, the affidavit now produced, and on which I am asked to grant the relief prayed, states the deponents belief in his death. It is made by his mother, and from it, it appears that he was in the American army, and up to 1860 in correspondence with his family. In September of that year a letter was received from him. He was then in the 2nd Infantry, with Col. Harney, on the

(*a*) 2 Cham. R. 417.

(*b*) Barrett v. Gardner, 1 Cham. R. 344; Bank of Montreal v. Power, 2 Cham. R. 47.

1871.

Street v. Dolan.

western frontier, guarding it against Indian incursions; his period of service had nearly expired, and he stated his intention of re-enlisting when it did expire. Since then he has not been heard from, but his brother *James*, returning recently from California, heard in Missouri, near where *Michael* had been stationed, that he had been killed by the Indians. His mother, in the affidavit, says, "I believe he is dead."

Denis Meehan, it seems, married *Bridget Dolan* over fifteen years ago, but after living with her for about three months he left, and has never since been heard of: the presumption therefore is, that he is dead. In *Shaw* v. *Acker* (*a*) *Mowat*, V.C., refused to advertise a defendant who had left for Australia fourteen years before, and not been since heard of by his wife or family. It was said that the Vice Chancellor did so because he was the sole defendant; but in *Kelley* v. *Macklem* (*b*), the present Chancellor refused a similar order, in the case of one of several defendants, not heard of for upwards of seven years.

Judgment.

It was urged that any interest *Meehan* could have, he derived under his wife, and that if she was foreclosed he could not stand in any better position, and an order foreclosing him might therefore properly be made. I cannot agree with this. A person who has purchased a part of the mortgaged premises from the mortgagor, derives his title or interest under him; but in a suit to which that person was not made a party, the fact of an order having been made foreclosing the mortgagor, would not justify an order *ex parte* foreclosing the other.

Re Hare, Carpenter v. *Kelly* (*c*) was cited as an authority for dispensing with service, on the ground that the interest of these parties is small, indeed nominal.

(*a*) 1 Cham. R. 395. (*b*) 1 Cham. R. 396. (*c*) 2 Cham. R. 417.

1871.

Street v. Dolan.

That case has frequently been cited in cases like the present, and I wish to prevent its being ever so cited again. *Re Hare* was a suit for administration, and the Master ordered one of the next of kin, whose interest was about the value of £5, to be served with an office copy of the decree, under Order 60. The Solicitor, on account of the expense of serving him personally in Michigan, asked an order for service by mailing. Order 60 requires, only such persons as would, under the practice existing when it was passed, have been necessary parties to the suit to be served, and the person added in *Re Hare* would not have been a necessary party (*a*), so service on him was dispensed with. The case is applicable only to the class of suits mentioned in Order 58.

Judgment.

The present application must be refused.

Re Linet.

Quieting Titles Act.

A petitioner claiming title by length of possession against the patentee of the Crown, failed to shew that the patentee or his heir had any knowledge of such possessson. It was held that he must shew a forty years possession, or such knowledge.

[March, 1871.]

Mr. Taylor, Referee in Chambers.—The petitioner seeks to obtain a certificate of title to the south half of lot 29 in the third concession of the Township of Vaughan. He claims title solely by length of possession.

The land was granted by the Crown (with other lands) to one *Samuel Reinor*, in 1737, but it continued unoccupied and entirely in a state of nature until some

(*a*) Calvert on Parties, 58; Caldecott v. Caldecott, Cr. & Ph. 183; Waite v. Temple, 1 S. & S. 320.

time in the year 1831, when *Abraham Spiker* went on the lot, put up a house and made a small clearance. *Spiker* after being in possession for several years sold his right to *Thomas Nicholson*, who made trifling improvements, and a few years after sold his right to *William Keyneth* who died while in possession. After his death his son and heir-at-law continued in possession for five or six years, and sold to the petitioner in 1845, there being at that time about sixty acres cleared and under cultivation. 1871. Re Linet.

It is not alleged that the patentee of the Crown or his heirs have ever had any knowledge of the lot having been taken possession of. As forty years have not elapsed since possession was taken, this is a fatal bar to the petition being entertained. When such notice or knowledge is proved, twenty years may bar the right of the patentee, or those claiming under him, but unless such knowledge is proved, forty years is the limit (*a*). Here the forty years have not yet elapsed, so that the petitioner has not made out even a *primâ facie* case. Judgment.

Messrs. *O'Donohue* and *Fitzgerald*, solicitors for petitioners.

(*a*) Con. Stat. U. C. ch. 88, sec. 3.

1871.

RE HARDING.

Quieting Titles Act, certificate, &c.

Where a Sheriff certified that he had not on a particular day any executions against the lands of a petitioner, it was *held* insufficient, and that he should have certified that he had not had any for the thirty days previous, and that the lands in question had not been sold under execution for the preceeding six months.

Where the County Treasurer certified that "there is no tax charged in his office against lot, &c.," *held* insufficient, and that it should be shewn that the return of lands in arrear for taxes for the preceding year had or had not been made by the Township Treasurer; also, that the County Treasurer's certificate should shew that the land had not been sold for taxes for eighteen months preceding its date.

[March, 1871.]

MR. TAYLOR, REFEREE IN CHAMBERS.—The petitioner has applied for a certificate of title under the Act for Quieting Titles. The certificate as to executions against the petitioner is not sufficient, and a further one must be supplied. The sheriff certifies simply, that he had not on a particular day any executions against the lands of *Samuel Harding*, he should go on to state that he has not had any for the thirty days previous, and that the lands in question have not been sold under execution for the preceding six months.

Judgment.

I observe that similar certificates are produced as to executions against *William Hare*, *James D. Hare*, and *George Swinson*, former owners of the land. This was a very unnecessary expense. *William Hare* was the original patentee, and he conveyed to *James D. Hare* in 1828; *James D. Hare* conveyed to *George Swinson* in 1836, and *Swinson* in 1841 conveyed to the petitioner, who has been in undisturbed possession ever since. Where the petitioner acquired his title within two years before the filing of his petition, a certificate of executions against his grantor was required, because executions against him if duly renewed might be binding upon the

lands: *Re Lyons* (*a*). In the same case it was held after seven years the presumption might be made, without evidence, that there were not any renewed executions. 1871. Re Harding.

The certificate from the County Treasurer is also defective. It is in these words: "There is no tax charged in this office against the west-half of lot No. 1, in the first concession of Reach." It is necessary to shew, not only, that there are no arrears of taxes charged against the lot at the date of the certificate, but also whether the return of lands in arrear for taxes for the preceding year has or has not been made by the Township Treasurer, under the 29 & 30 Vic., ch. 53, sec. 110. If the return has been made, and no taxes are in arrear, the County Treasurer's certificate is alone sufficient; but if the return has not been made, then the certificate of the Township Treasurer shewing that the collector's roll for the preceding year has been received, and that the taxes are paid, must be got. The Treasurer's certificate should also shew that the land has not been sold for taxes for eighteen months preceding its date. The County Treasurer is now the officer who conducts sales for taxes (*b*), and is therefore the proper person to certify on this point. Judgment.

When *William Hare* conveyed to *James D. Hare*, and when the latter conveyed to *George Swinson*, their wives, if any, did not join in the conveyances, and an affidavit is filed that they are both dead, and that neither of them left a widow surviving him. This affidavit is made by a Mrs. *Hare*, a widow. She may be a relative, but it does not appear that she is so, nor even that she was acquainted with either of them. The deponent should state that she is either a connection, or intimately acquainted with them, and must have known of their being married, if they were so.

Messrs. *Ince* and *Hannah*, solicitors for petitioner.

(*a*) 2 Cham. R. 359.

(*b*) 29 & 30 Vic. ch. 53, sec. 139; Ont. Stat. 32 Vic. ch. 36, sec. 138.

1871.

LAPP v. LAPP.

Amending decree.

A motion to amend a decree in which the pleadings and evidence or anything beyond the judgment and decree have to be looked at, must be presented in Court, and not in Chambers.

Under Order 562, the Referee will order such matters only as can regularly be brought on before him in Chambers to be heard before a Judge, if he thinks it proper. Where on a petition to amend a decree the petitioner asked in the alternative for a rehearing and that the Referee would adjourn that part of the application to be heard before a Judge, the Referee held it to be beyond his jurisdiction and dismissed the petition with costs.

[March 20, 1871.]

The defendant *Henry Lapp* presented a petition, alleging that the judgment in this case, pronounced by the Chancellor, declared certain legacies to be charged upon the personal and real estate of the testator, other than the homestead upon which he resided at the time of his death, but that the decree drawn up on that judgment made them a charge upon all the testator's personal and real estate. The prayer of the petition was, that the decree might be amended by making the seventh paragraph in conformity with the judgment, or that the defendant might be permitted to rehear the cause, although the time allowed for that purpose had elapsed. By the notice endorsed on the petition, notice was given that in addition to the judgment and decree two affidavits and the exhibits referred to in them would be read.

Mr. *Macdonald*, for the petitioner.

Mr. *Cassels*, contra.

Judgment. MR. TAYLOR, REFEREE IN CHAMBERS.—I cannot look at the affidavits for the purpose of considering whether the decree, as drawn up, is erroneous or not.

1871.

Lapp v. Lapp.

On an application like the present in Chambers, under General Order 335, nothing can be used except the judgment and the decree. An amendment of a decree may in some cases be obtained without reheaing the cause, but if on an application for that purpose the pleadings or evidence, or anything beyond the judgment and decree have to be looked at, the petition must be presented, not in Chambers, but in Court under General Order 336.

Upon reading the judgment of the learned Chancellor (*a*) I find that all he says on the question now raised is, "I think all the legacies are by the will charged upon the real estate. The testator makes the real and personal estate a mixed fund, and directs all the legacies to be paid out of it."

Judgment.

Minutes of the decree were in due course prepared, and they contained a declaration that these legacies are "charged upon the mixed fund created by the said will out of his personal estate and residuary real estate." This, as I understand, would have exempted the homestead, which was specifically devised. A motion was then made at the instance of the present petitioner to vary these minutes. The principal point which appears to have been discussed upon that motion related to the widow's dower, but from the Chancellor's notes I find that counsel for the applicant insisted that the word "residuary" should be struck out. A written judgment was delivered on that motion, or rather a draft of a decree was prepared by the Chancellor himself, in which are these words, "Paragraphs 6, 7, and 8, as altered in pencil, also the 9th and subsequent paragraphs as in minutes drawn by the Registrar." On turning to the draft minutes, which are filed, I find that the the latter part of paragraph 7 is struck out, and after

(*a*) 16 Gr. 159.

1871. Lapp v. Lapp.

the words, "all the legacies are charged," these words, "upon his real and personal estate," are inserted in the Chancellor's handwriting. In the face of all this, how can it be said that the decree is not in conformity with the judgment. I must refuse the application to amend the decree.

The other part of the relief asked, namely, leave to rehear the cause, is not within my jurisdiction: Order 560. This was admitted by the petitioner's solicitor, but he asked that in the event of my not granting the relief primarily sought, I should adjourn this part of the application for hearing before a judge, under Order 562. I cannot do this. It is only such matters as are regularly before me and which I may think proper for the decision of a judge, that I can direct to be so heard. This part of the application is not regularly before me. I have no jurisdiction in respect of it at all. As this is the case, and as I find on the first point that the decree, as it stands, is in accordance with the judgment of the Court, I must dismiss the petition with costs.

Judgment.

ROSS v. VADER.

Decree on præcipe.

Where in a mortgage suit a defendant by answer admitted the making of the mortgage, but denied an alleged agreement to pay an increased rate of interest, and set up a tender of the amount he contended was properly due on the mortgage, and claimed his costs, it was held not to be a case where the plaintiff was entitled to a *præcipe* decree.

The plaintiff's solicitor asked that if the Referee considered the decree erroneous, it might be amended by inserting a direction for the Master to enquire as to the alleged tender. *Held*, that such an amendment could not be made, the decree being one which could not be issued on *præcipe*, and that a decree so issued could contain no special directions or provisions.

[March, 1871.]

The bill was one for foreclosure by the administratrix of the original mortgagee; it alleged the making of the

1871.

Ross v. Vader.

mortgage, an agreement by the defendant, since the mortgagee's death, to pay an increased rate of interest, and claimed as the amount due $601.56. The defendant filed an answer in which he admitted the original mortgage, denied the agreement to pay an additional rate of interest, claimed that there was only $272 due and sets up that before the filing of the bill he tendered the full amount, which was refused, and he claimed his costs against the plaintiff.

Mr. *C. Moss*, for the defendant.

Mr. *McGregor*, contra.

On the 16th of November, 1870, a decree was issued on *præcipe* directing a reference to the Master, at Belleville, and containing the usual directions for taking accounts and taxing costs. The defendant now moved to set this aside on several grounds, the more important of which resolved themselves into this, that the Registrar had no authority under the circumstances to issue a decree on *præcipe*. Nothing had as yet been done under the decree, and from the affidavit of the defendant's solicitor it appeared that he only recently became aware of its existence.

Judgment.

MR. TAYLOR, REFEREE IN CHAMBERS.—No objection is taken that the defendant is too late in now moving.

The practice as to issuing decrees upon *præcipe* is governed by General Order 435. That order provides that "Where the defendant answers the bill, admitting the execution of the mortgage and other facts, if any, entitling the plaintiff to a decree, or where the defendant disclaims any interest in the mortgaged premises, or where no answer is put in to the bill, the plaintiff is, on *præcipe* to the Registrar, to be entitled to such a decree as would under the practice of the Court have been made upon the hearing of the cause *pro confesso*."

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The answer in this case is not one which admits the execution of the mortgage and other facts entitling the plaintiff to a decree. It is true it admits the mortgage, but it denies the subsequent agreement under which the plaintiff claims increased interest, and sets up a tender which, if proved and shewn to be sufficient, would entitle the defendant to his costs: *Williams* v. *Sorrell* (*a*), *Hodges* v. *The Croyden Canal Co.* (*b*), *Cornwall* v. *Brown* (*c*). Under the decree as it stands, the plaintiff must get all the costs, even if it should turn out on taking the account that only the lesser amount is due, and that the defendant made a good tender before bill filed. The decree directs the Master to tax to the plaintiff these costs, and the Master must obey the directions in the decree: *McLeod* v. *Millar* (*d*), *Quarrel* v. *Beckford* (*e*), *Wilson* v. *Metcalfe* (*f*).

Judgment.

The solicitor for the plaintiff asked, if I should come to the conclusion that the decree is erroneous in its present shape, that it should be amended by inserting a direction for the Master to enquire as to the alleged tender, and providing for the costs according to the result of that enquiry. I cannot make such an amendment; the decree thus amended would still be one which the Registrar cannot issue on *præcipe*; such a decree can contain no special directions or provisions. Where an injunction to prevent waste has been granted against the mortgagor, it is almost of course to continue the injunction by the decree, but the Registrar cannot insert a clause for that purpose; the cause must be set down for hearing: *King* v. *Freeman* (*g*).

The objection to the style of the cause I have not considered; had that been the only objection, the plaintiff might probably have got leave to amend if necessary.

(*a*) 4 Ves. 389. (*b*) 3 Beav. 90. (*c*) 3 Grant 683.
(*d*) 12 Gr. 194. (*e*) 1 Mad. 269. (*f*) 1 Russ. 530.
(*g*) 1 Cham. R. 350.

The decree must be set aside with costs. As the defendant admits that an amount, which must exceed these costs, is due from him, the plaintiff may set the costs off against the amount coming to her. 1871. Ross v. Vader.

RE BELL.

Quieting Titles Act—Evidence of lost deed—Possession, &c.

In seeking to prove the existence and contents of a lost deed, the affidavit of the petitioner alone as to searches is not sufficient; the particulars as to searches, by whom made, where, and why there made, should be given, and such a case generally as would before a Court be sufficient to let in secondary evidence.

A memorandum made in a book by a party through whom the petitioner claimed, was held not to be evidence in favor of petitioner.

Where the petitioner seeks to establish title by possession, the possession under which a title is claimed, must be uninterrupted possession and one of the land, and should be in accordance with the title set up.

Proceedings under the Quieting Titles Act will not be made a substitute for an action of ejectment, and a petitioner must therefore have substantially an estate in possession.

[April, 1871.]

This was an application under the Act for Quieting Titles. The facts appear in the judgment.

Mr. *Bell*, Q.C., for the petitioner.

Mr. *T. Moss* and Mr. *C. V. Warmoll*, for the contestant.

MR. TAYLOR, REFEREE IN CHAMBERS.—The petitioner has applied to have his title to the east half of Lot 3, in the 1st concession of Mersea, investigated and declared, under the Act for quieting titles to real estate. Lewis Wigle has filed a claim disputing the peti- Judgment.

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Re Bell.

tioner's right to a certificate, and claiming the property as his own. It is admitted that the petitioner is not, and never has himself been in possession of the land, but that Wigle, or those through whome he professes to derive his title, are in occupation of it. Affidavits have been filed by the petitioner in support of his case, and the deponents have been cross-examined by the contestant. As he is in possession, he in the meantime brings forward no evidence in support of his own title, but contents himself with putting the petitioner to proof of his. He has a right to adopt this course. It has been held in *Armour* v. *Smith* (*a*), that a contestant in possession, before shewing his own title, has a right to review and contest the title of the claimant. The reasonableness of this is abundantly evident. Possession is *primâ facie* evidence of seisin, and the common remark made use of in connection with ejectment suits, that the plaintiff must recover on the strength of his own title, and not on the weakness of his opponent's, may very well be applied to a claimant seeking to obtain a certificate of indefeasible title under the Act.

Judgment.

The petitioner asserts title to the land in two ways, —first, by a paper title; second, under the Statute of Limitations.

The paper title set up by the petitioner is as follows: In 1802, the Crown granted the whole lot to one *Fleming*, who in 1806 conveyed to *Samuel Weston*; *Weston*, in 1807, conveyed the half lot in question to *Archibald Wright*, and *Wright* afterwards conveyed to Colonel *Robert Nichol*, whose heir-at-law, in 1861, conveyed to the petitioner. All the deeds are produced (either originals or memorials of them), except that from *Wright* to *Nichol*, which has never been

(*a*) 16 Gr. 380.

registered, and has never been in the petitioner's possession. The petitioner, however, gives evidence of various facts and of general reputation, from which he contends that the existence of such a deed must be considered as established. The contestant objects, that even if the existence of this deed is considered to be proved, sufficient proof of search for it has not been given, to let in secondary evidence of its contents. The only evidence of such search is contained in the affidavits of the petitioner, and of *Nichol's* heir-at-law. The petitioner, after stating that he does not know in whose possession or power certain of the evidences of title (this deed being one of them) are, goes on to say: "I have caused the following searches to be made, that is to say, among the papers of the late *Robert Nichol*, among the papers of *Clark* and *Street*, among the papers of my late father, *Thomas Bell*, where I discovered the deed from *Fleming* to *Weston*, at the Registry Office for the County of Essex, and with *Charles Baby*, Esq., who was at one time supposed to have some of said deeds, and with the heir-at-law of the late Colonel *Robert Nichol*, whose affidavit will appear in this matter." The heir-at-law, in his affidavit, sworn the 31st January, 1870, says: "I have not been able to find my said late father's deed for said land, but I am, from the information I have received from many sources, quite sure he had one from *Archibald Wright*, the former reputed owner thereof." In another affidavit, sworn on the 12th of February, 1870, he says: "Since I have attained my majority his papers and vouchers have come to my hands, and although I have carefully searched for the deed to him for the above land, I have been unable to find the same. * * * I verily believe my father's deed of said property to be lost or destroyed."

1871.

Re Bell.

Judgment.

I do not think sufficient proof of searches for this missing deed has been given. An affidavit of search

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by the petitioner himself, is insufficient. *Sug.* V. & P. 437; *Taylor* on Titles 137; *Stubbs* v. *Sargon* (*a*). It has been laid down, that, where the document, if in existence, should be in the possession of the party who desires to give secondary evidence of its contents, the proper course is, that he should search with a witness, and that the search should be so conducted, and in such places, as to afford a reasonable ground for concluding that it was made *bonâ fide*, both as regards the witness and the party, by giving and using all possible facilities to make it effectual: *Bratt* v. *Lee* (*b*). Here all that the petitioner says, is, that he has caused searches to be made; no information is given by whom or how the searches were made; it is not said why searches were made in the particular places where they were made, except in the case of *Charles Baby*, who it is said was supposed to have some of the deeds; nor is it said that the places searched are the only places known to the petitioner where this deed is likely to be. The heir-at-law of Colonel *Nichol*, it is true, has made a careful search, and has been unable to find this deed, but he says that it is since attaining his majority that his father's papers have come to his hands. Now at his father's death he was an infant about two years' of age, so that for nearly twenty years these papers must have been in other custody. It is not said he received all his father's papers, nor is it shewn in whose custody they were during his minority, or that any search for the deed has been made with the persons who had them during that period. The evidence given is not such, I think, as would be sufficient to let in secondary evidence on a trial at law, or hearing in equity: *Doe d. Richards* v. *Lewis* (*c*); *Taylor* on Ev. 424; and the same evidence is necessary in a proceeding to obtain a certificate of title under the Act: *Re Chamberlain* (*d*); *Taylor* on Titles, 137. If, however,

Judgment.

(*a*) 4 Beav. 90.
(*b*) 7 C. P. U. C. 280.
(*c*) 11 C. B. 1035.
(*d*) 2 Cham. R. 352.

it should become important, an opportunity might be afforded the petitioner of giving more definite evidence on this point, and supplying the defect. 1871. Re Bell.

It next becomes necessary to consider whether the existence of this deed is established. Proof that the deed is in existence, or that it once existed, is an essential preliminary: *Doe* v. *Whitcomb (a)*. None of the witnesses who have made affidavits ever saw the deed. It is not proved that *Wright* was ever heard to say he had made such a deed, or that Colonel *Nichol* ever said he had received one from him. Colonel *Nichol* was a large land owner, and from his memorandum book produced, I should infer accurate and careful in his business matters. The title to this lot was a registered one, but he never registered this alleged deed. General evidence of his being the reputed owner, and of his having a deed is given, and from this the inference is desired to be drawn that a deed was executed by *Wright*. Judgment.

Wright was in possession of the land about 1807, and the consideration for which the alleged deed was given is said to have been Colonel *Nichol's* supporting him for life. From two affidavits made by *Thomas Bell* and *Asa Wilcox*, in 1834, and which were used in proceedings before the Heir and Devisee Commission respecting another lot in the Township of Mersea, it appears that *Wright* left that part of the country about 1809 or 1810; he was then between fifty-five or sixty years of age, and appears to have had no relations. The Heir and Devisee Commission upon the evidence then laid before them certified in favour of a patent issuing for the land in question in the proceedings before them, in favour of *Henry Wright*, who claimed the same by gift from *Archibald Wright*. *Archibald Wright* is said soon after leaving that part of the

(a) 6 Ex. 601; 4 H. of L. Cas. 431.

1871. country to have left the Province and never to have been heard of since.

Re Bell.

The witnesses whose evidence the petitioner produces to prove the existence of the deed, are *John Dawson, Joseph Mallott, Sarah Roberts* and *Gordon Buchanan.*

John Dawson, an old man over eighty years of age, who was at one time in Colonel *Nichol's* service, and who had the oversight of this lot as his agent, makes an affidavit, that he was well informed as to a great deal of his business and property transactions, "and in the course of acquiring such information, I acquired the knowledge that said *Nichol* owned and had a deed of the east-half of lot No. 3, in the front concession of Mersea, and I am most certain that on this last point my information was correct, for it was always confirmed by the neighbours then living, and who then had the means of knowing, from all the parties concerned, as well the said *Nichol* as the said former owner thereof, one *Archibald Wright,* from whom said *Nichol* obtained said land. I have heard said deed is lost, but I have no knowledge as to how or when it was so lost." Upon his cross-examination he modifies his statement, and says: "I believe Colonel *Nichol* had a deed of the lot. I never saw a deed of the lot. On hearing read the second paragraph of my affidavit (that just quoted) made in this matter, I did not mean to say that Colonel *Nichol* had a deed of the lot in question, or that I knew that he owned it. Although I believe that he had a deed, and I believe that he owned it. I never saw a deed of the lot to Colonel *Nichol.* I never heard anybody say that Colonel *Nichol* had a deed of the place. He was reputed by the neighbours to be the owner of it. * * Colonel *Nichol* never told me that he had a deed of the land."

Judgment.

1871.

Re Bell.

Sarah Roberts, a very old woman who has lived nearly sixty years near the land, gives in her affidavit the most positive testimony of the deed's existence which is offered. She says that she was acquainted with *Archibald Wright* who owned the land about 1806; "I was well aware from the information that I always received, as well from the said *Wright* as others, that said *Wright* had deeded said east-half lot to *Robert Nichol*, for his support during the rest of his life." She also was cross-examined upon her affidavit, and on that examination she says: "I do not know whether *Archibald Wright* ever made a deed of the place to any one. I never knew *Robert Nichol*. I have heard of him, and probably in connection with the land in question." This old woman is a sister of Mrs. *DeLurie* who is in possession of part of the land, and it is suggested, that when she made the affidavit, in the Spring of 1870, she was not aware that it would in any way affect her sister's interests, but when cross-examined recently she knew that it might do so, and modified her former statements accordingly, saying, her memory is gone. It is not unlikely that her memory is bad. She is an old woman in the eighty-fifth year of her age, and has been ill since she made her affidavit. Had she stood alone in modifying her evidence on cross-examination there would have been greater force in the remark made by the petitioner that her illness has impaired her memory, so that she now forgets what she remembered distinctly in the Spring of 1870, but all three witnesses who testify to the existence of the deed when cross-examined vary their evidence in the same way.

Judgment.

Joseph Mallott, sixty-nine years of age, who has lived all his life within a short distance of the lot says: "I cannot say I ever saw Colonel *Nichol's* deed, or that *Archibald Wright*, the former owner thereof, ever told me he had made a deed of said lot to said *Nichol*, but

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I say it was a fact of such common notoriety in those days that the said east-half lot had been deeded to said *Nichol* before said *Wright* left this part of the country, that I never had, and have not now, the least doubt of the truth thereof." It may be remarked that the likelihood of *Wright* telling the deponent of his having deeded the lot to any one, would be very slight, as he could be a boy of at most only nine years of age when *Wright* left the neighbourhod. Upon cross-examination he said, he was very young when *Wright* left the country, but remembers his father and mother saying that *Wright* had gone away; "I am not positive as to how or when I got the notion that the lot in question was *Nichol's*. It might have been from *Dawson*. I am positive that I have never heard of a deed passing from *Wright* to *Nichol*."

Judgment.

Gordon Buchanan, another very old resident in the neighbourhood, and who was not cross-examined, says he well remembers the circumstance of *Wright* selling the place to Colonel *Nichol* being spoken of, and that he had not then, nor has he now, any doubt that such was the fact, but he does not say that he had any personal knowledge of the fact, nor does he say anything about a deed being executed, even from hearsay.

The evidence, so far, is quite insufficient to establish that such a deed existed duly executed, and that it was a conveyance in fee. No one has ever seen it. Nothing more than a vague general belief that Colonel *Nichol* had a deed is sworn to by any one. Even in a specific performance suit the Court would not on such evidence force the title on a purchaser. In such a suit if the title deeds are lost, the vendor must furnish the purchaser with the means of shewing what were the contents of the deeds, and of proving that they were duly executed; *Sug.* V. & P. 438. In *Bryant* v. *Busk* (*a*),

(*a*) 4 Russ. 1.

where the title deeds were destroyed by fire after the contract, the Master of the Rolls held the seller bound to furnish the purchaser with the means of asserting his title and defending his possession; and that even assuming that the abstracts duly and fully proved the contents of the deeds, yet it remained to be proved that such deeds were duly executed and delivered. If such evidence is necessary in making out a title in an ordinary suit for specific performance, can less evidence be acted on when the object of the person shewing his title is to obtain an absolute and indefeasable title against the whole world?

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The production of Colonel *Nichol's* memorandum book does not, I think, help the petitioner's case. In two places in that book a list of lands occurs, and in each is entered "Mersea, 100." I do not lay much stress upon the remark of the learned counsel for the contestant, that neither the number of the lot nor the concession is stated, because in no case is there more than the name of the township and the number of acres But then these are entries made by Colonel *Nichol* himself, not against, but for his own interest, and can never be used as evidence in his favour, or in favour of those who claim under him. To hold that a man can make out his title to a particular piece of property on the strength of an entry made by himself, or by the person through whom he professes to derive his title, in a private book claiming the land as his own, would be an exceedingly dangerous doctrine: *Doe d. Padwick* v. *Skinner*, 3 Ex. 84.

Judgment.

In addition to the evidence already referred to, evidence of general reputation is offered to establish Col. *Nichol's* title. Such evidence is not, however, admissible in a case like the present. Where questions of general interest affecting the rights of the public, such as the boundary of a parish, or the like, are at issue, it

1871. Re Bell. might be received, but not when a private right or title only is involved.

In *Morewood* v. *Wood* (*a*), where the matter in dispute was the right to dig stones in the lord's waste, Lord *Kenyon* said: "With regard to the other question raised respecting the rejection of general evidence of reputation, it is involved in great dispute; and one is apt to imbibe prejudice from the opinion one has always heard inculcated. Upon the Oxford circuit which I went, such evidence was never received, and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles? How is it possible for strangers to know anything of what concerns only these private titles?" In Lord *Dunraven* v. *Llewellyn* (*b*) Baron *Parke* delivered the judgment of the Court of Exchequer Chamber, and after stating the question to be, whether Baron *Platt* was right in rejecting evidence of reputation, offered on the trial before him, to shew the title of the lord of the manor of Ogmore to certain lands within the ambit of the manor, the learned Baron went on to say, "If this question had been one in which all the inhabitants of the manor, or all the tenants of it, or a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor would have been admissible, such resident having presumably a knowledge of such local customs; and if there had been a common law right for every tenant of the manor to have common on the waste of it, reputation from any deceased

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(*a*) 14 East. 327. (*b*) 15 Q. B. 791.

tenant as to the extent of these wastes, and therefore as to any particular land being waste of the manor, would have been admissible." Then after remarking upon what were really the rights of the free tenants, he adds: "We are therefore of opinion that the case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's wastes; and reputation is not admissible in the case of such separate rights, each being private. We are of opinion, therefore, that the evidence of reputation offered in this case was, according to the well established rule in the modern cases, inadmissible, as it is in reality in support of a mere private prescription.'

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In the last case, *Weeks* v. *Sparke* (*a*) was cited and relied on as an authority for admitting such evidence. In that case the evidence was admitted because the Court considered it as in fact one "between the plaintiff and a multitude of persons." Though the evidence was admitted, the Chief Justice (Lord *Ellenborough*) expressed his opinion respecting the reception of such evidence in the following language: "The admission of hearsay evidence upon all occasions, whether of public or private rights is somewhat of an anomaly, and forms an exception to the general rules of evidence. I confess myself at a loss fully to understand upon what principle, even in matters of public right reputation was ever deemed admissible evidence. It is said indeed, that upon questions of public right all are interested, and must be presumed conversant with them, and that is the distinction taken between public and private rights, but I must confess I have not been able to see the force of the principle on which that distinction is founded so clearly as others have done, though I must admit its existence." Other cases on

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(*a*) 1 M. & S. 679.

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this point might be cited, as *Rex* v. *Antrobus* (*a*), *Pim* v. *Curell* (*b*), *Williams* v. *Morgan* (*c*), *Doe dem. Didsbury* v. *Thomas* (*d*). But even assuming that such evidence can be received, when the general belief in this case is traced back, it will be found to have its origin in the acts of Colonel *Nichol* himself. Besides the passage already quoted from the affidavit of *Joseph Mallott*, we find him saying, that as long ago as the year 1809 the lot was known and respected as the property of the late Colonel *Robert Nichol*, and as such it was always respected and occupied until since the *Deluries* have claimed it by length of possession. *Francis Wilkinson*, *Elizabeth Lovelass*, and *Theodore Mallott*, who have known the lot for upwards of fifty years, all say in their affidavits that the the same has been the case as far back as they can remember. All these persons were cross-examined, and on cross-examination they all fix upon the time when *Dawson* became connected with the lot as the time when it began to be known as Colonel *Nichol's*. *Wilkinson* says the lot "was not known as *Nichol's* lot before *Dawson* came to live on it—to my knowledge." Mrs. *Lovelass* "cannot recollect the name of Colonel *Nichol* mentioned in connection with the lot in question until after *Delurie* rented the lot from *Dawson*. All I heard was, that *Delurie* rented the place from *Dawson*, and *Dawson* from *Nichol*." *Theodore Mallott* says that *Dawson's* taking possession is as long back as he can recollect.

Judgment

Dawson's connection with the lot began in 1823, and his affidavit and cross-examination state the circumstances under which he became connected with it. He had been at one time in Colonel *Nichol's* service, and in January, 1823, came to Toronto, then Little York, to obtain payment of some money which *Nichol* owed

(*a*) 2 A. & E. 788.
(*b*) 6 M. & W. 234.
(*c*) 15 Q. B. 782.
(*d*) 14 East. 323.

him. *Nichol* then gave him authority, he says, to take possession of his lot in the new settlement of Mersea, telling him to warn off a man whom he (*Nichol*) had allowed to occupy it. This man (who appears to have been *Sayers*, spoken of by some of the witnesses), accordingly gave up possession in the end of 1823, and *Dawson* continued to take charge of the place until in 1828 or 1830 he rented it to *J. B. Delurie*. Annexed to *Dawson's* affidavit is a pencil memorandum, purporting to be a copy of a certificate signed by Colonel *Nichol*, that *Dawson* had authority to take possession of the lot in question, describing it as the east-half of lot No. 3 on the lake shore, formerly owned by *Samuel Weston*, and to remain in possession until warned off. The use sought to be made of this is, to connect *Nichol* with this particular lot, and to shew that as far back as 1823 he claimed it as his, and exercised acts of ownership over it; but it is not an original document, indeed it is not even a copy of an original document. It is only a copy of what is called a copy, but which appears to have been made on a loose piece of paper by *Dawson* from memory, the original having been lost upwards of forty years before. The copy so made from memory has also been lost. It is hardly necessary to say that such a document cannot be admitted as evidence. As Mr. *Taylor* remarks, "such evidence would be but the shadow of a shade."

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Dawson's connection with the lot then, seems to have arisen in this way: Colonel *Nichol* owed him money, which, perhaps, it was not convenient at the time to pay, and, it may be, knowing that *Wright* had left the country many years before, and was not likely to return, he told him to take possession of this lot, intending thereby to pay what he owed, and perhaps hoping at some future time to acquire the title by the possession of his agent. *Dawson* took possession simply on the word of *Nichol* that he owned the lot, and from

1871. his taking possession the general belief arose, so that general belief is after all only Colonel *Nichol's* own statement. So far as the petitioner relies on a paper title I must hold that he has failed to establish it.

Re Bell.

The petitioner, however, claims title also by length of possession He alleges that *Wright* left before 1810, that from 1817 to 1819 a man named *Wilkinson* was in occupation of a house on the lot, and that on his leaving, *Sayers* went into possession under Colonel *Nichol*, and continued to occupy until 1823, when he gave up possession to *Dawson, Nichol's* agent. Then after 1823 *Dawson* continued to take care of the lot in that character, until he rented it in 1828 or 1830 to *Delurie*, who was tenant until 1841, paying rent in that year, when he went to Michigan. *Delurie* returned from Michigan in 1845, and applied to *Dawson* for the purpose of again leasing the place, but was refused. Mrs. *Delurie*, his wife, then went into occupation of the house and a few acres which were cleared, and has continued, living separate and apart from her husband, to occupy the same small piece ever since, and is now in occupation of it. *Delurie* himself, who had again gone to the States, returned in 1865, since which year he has occupied a few acres at the opposite end of the lot.

Judgment.

The petitioner claims to have clearly made out possession by *Nichol*, or those claiming under him, from 1819 to 1841, a period of over twenty years, so that if *Nichol's* heir had in 1841 brought ejectment, he must have recovered. He further argues that the application made by *Delurie* to *Dawson* as *Nichol's* agent in 1845, was an acknowledgment of *Nichol's* title, and that any possession since has been the possession of a married woman living apart from her husband, and therefore not such as could confer any title, either on her or her husband. The petitioner contends from this, that

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Colonel *Nichol*, having died intestate in 1824, leaving an infant heir-at-law, who did not attain his majority until 1843, *Delurie's* possession even if it began adversely in 1828, could not begin to run against the heir-at-law until 1853, so that there has not been twenty year's adverse possession. The petitioner further claims title, in any event, to the north-half of the lot, because even if *Delurie* had title by possession, he, in 1861, conveyed the north sixty acres to one *Askew*, who in 1870 conveyed the north fifty acres to the petitioner.

The evidence produced proves that *Wright* was in possession, but left before 1810. Nothing is shewn as to the possession from the time of his leaving until 1817 or 1818, when a man named *Wilkinson* is said to have lived about two years in the house on the lot, while putting up buildings on his own farm. Then on his leaving in 1819, *Sayers* went into possession, and continued some years. *Dawson* says, Colonel *Nichol's* instructions, when giving him authority to take possession, were to warn off the man he had allowed to occupy the place. He does not remember the man's name, but the statements of other witnesses shew the man to have been *Sayers*. As to how he came to be in possession at all there is no evidence, except Colonel *Nichol's* statement to *Dawson* that he had allowed him to occupy the place. From 1823 to 1828, according to *Dawson*, or till 1824, according to Mrs. *Delurie*, *Dawson* "assumed authority over and protected the place as well as he was able," getting the fruit on it as a compensation. In 1828 or 1830, he says, "I agreed with *John Delurie* to let him occupy the place and take care of the orchard under my authority, and he agreed to give me therefor six chairs as rent, as I think for each year he occupied the place." Mrs. *Delurie* dates back the taking possession under *Dawson* to 1824.

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It does not appear that *Dawson* let the place to *Delurie* for any certain term, he simply, as he says, allowed him to occupy the place and take care of the orchard. No certain rent seems to have been fixed. *Delurie*, it is clear, was only a tenant at will. It is not certain during what period he was in actual possession; *Dawson* says from 1828 or 1830 until 1841, when he went to Michigan, from which he returned in 1845. According to others he went into possession first in 1824, and it was in 1841 that he returned from Michigan. His occupation while he had the property was of a very intermittent character. His habits seem to have been migratory. On his first taking possession he remained three or four years, and then removed to Colchester, where he lived two years; then he came back, and after staying on the lot two years, he moved off to Sandwich St., where he remained for two or three years; he then returned, and after staying about two years moved back to Sandwich St. again for five months, when he went to Michigan, and lived there for two years. Mrs. *Delurie* and her daughter at the end of that time came back; afterwards *Delurie* himself returned, and they all lived together on the lot for two years, at the expiry of which period he separated from his wife, and left, returning to Canada only a few years ago. Mrs. *Delurie* has lived on the lot all the time, and is still on it. *Dawson* places *Delurie's* leaving for the States in 1841, and the coming back from Michigan in 1845; and according to him *Delurie* has never until recently lived on the lot since he left it in 1841.

Judgment

From the time *Delurie* went into possession no other possession is heard of except his, and that of persons claiming under him or Mrs. *Delurie*. Even if when he was in possession up to 1841 he was there under Colonel *Nichol*, there was no such possession of the lot as would give a good title. To do this the possession

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must be shewn to have been continuous. As it was said in one case *(a)*, "visible and continuous possession;" and in another *(b)*, "long uninterrupted possession, enjoyment, and dealing with the property." Then the only possession during the period of *Delurie's* occupancy was of the ten or twelve acres cleared on the south side of the old road; no other part of the lot being cleared or occupied till about 1856. Such possession would not according to the authorities give title to any part of the property except that actually occupied. Difference of opinion may exist as to the soundness of the conclusions at which the Courts have arrived on this point; but as the authorities stand I feel bound to follow them. *Hunter* v. *Farr* (*c*), *Dundas* v. *Johnston* (*d*), *Young* v. *Elliott* (*e*), *McMaster* v. *Morrison* (*f*), *Low* v. *Morrison* (*g*), *Wishart* v. *Cook* (*h*), are all cases deciding this point. *Heyland* v. *Scott* (*i*) cannot be regarded as going further than this, that the Court of Common Pleas are begining to doubt the soundness of former decisions on this point.

Judgment.

I must hold on the evidence before me that Colonel *Nichol* and his heir had not, up to 1841; acquired any title by possession.

It is quite unnecessary to consider at present the effect of Mrs. *Delurie's* possession since, according to *Dawson*, 1845, or according to her own account, 1840, I am not now disposing of the question whether *Wigle* has acquired a title to the property or not, the only question I have to deal with is, whether the petitioner has shewn a good title in himself. There is no

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(*a*) Young v. Elliott, 25 Q. B. U. C. 333.
(*b*) Cottrell v. Watkins, 1 Beav. 365.
(*c*) 23 Q. B U. C. 327.
(*d*) 24 Q. B. U. C. 550.
(*e*) 25 Q. B. U. C. 334.
(*f*) 14 Gr. 138.
(*g*) 14 Gr. 192.
(*h*) 15 Gr. 287,
(*i*) 19 C. P. U. C. 172.

1871. Re Bell. pretence for saying, and it is not, as I understand, attempted to be said, that any possession of the lot since at all events 1845, has been by *Nichol's* heir, or any one for him, or claiming under him.

The deed from *Delurie* to *Askew* in 1861 could convey no title. *Delurie* had abandoned the place in 1841, and up to that time he had acquired no title; his possession intermittent as it was, not having been for twenty years, and he never returned to occupy any part of the lot until 1865, four years after making the deed. From the evidence it is quite certain that there was no possession of the north-half of the lot until within the last fifteen years.

Since the petition in this matter was filed a case has been decided in the Landed Estates Court in Ireland, under the Imp. Act 21 & 22 Vic. ch. 72, sec. 51, which is Judgment. an authority against such a petition as the present, where the petitioner is not in possession, being entertained. The language of the Imperial Act is very similar to that of the 29 Vic. ch. 25, sec. 1, in this country. Our Canadian Act is certainly not wider.

In *Re Carson's* estates (*a*), it was held that a party seeking a declaration of title, is bound to shew a possession in accordance with the title sought to be declared. In that case the learned Judge, after remarking that otherwise the Court could be used to try ejectments, under pretence of declaring titles, went on to say: "In my judgment a party seeking the valuable thing—a parliamentary title conferred by the Court—is bound to have substantially an estate in possession, in all its major incidents in present enjoyment; and cannot by his mere act of stating he disputes estates or rights of parties actually in unques-

(*a*) 4 Ir. R. Eq. 555.

tioned enjoyment of them, compel them to submit to the jurisdiction of this Court, and make this the place for trial of these rights. 1871. Re Bell.

"If he questions these long exercised rights, submitted to by him, or those from whom he derives, he should first take proceedings to establish his right, as he claims it to be, before he asks this Court to declare his title thereto; and unless this rule prevails in this Court on this branch of its jurisdiction, I can see most monstrous inconveniences, and displacement of the ordinary tribunals of the country through this very unpleasant jurisdiction to any one charged with its execution."

An opinion similar, though not so strongly expressed, was also arrived at in *Re Netterville* (*a*).

From the views thus expressed I think no one can dissent. To hold otherwise, would be to turn the Act for Quieting Titles, expressed in the preamble as intended "to give certainty to the title to real estate, in Upper Canada, and to facilitate the proof thereof," into a machine for trying ejectment suits. Judgment.

The learned counsel for the petitioner, who argued this case with his usual zeal and ability, admitted that some of the evidence brought forward to support the petitioner's case was not strictly legal evidence, such as would be admitted on a trial before a Court, but he submitted that it was receivable under the 9th section of the Act, being "evidence which the practice of English conveyancers authorizes to be received on an investigation of a title out of Court." I do not think it is. There seems to be a very general misconception as to the nature of conveyancer's evidence. From the language I have heard used by many people, it might

(*a*) 3 Ir. R. Eq. 504.

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be supposed that conveyancers would receive and act upon anything and everything as evidence. Now it is true that conveyancers under a choice of difficulties, frequently resort to, and require voluntary affidavits in support of facts and averments, when more direct proof cannot be obtained (*a*). These affidavits, though possessing no legal validity, are often all the evidence that can be adduced; and by general consent the profession adopt them as evidence upon titles (*b*). It is also true, that the practice of conveyancers in determining the admissibility of evidence is more lax than that of courts of justice (*c*); still, conveyancers in admitting evidence do not wholly disregard the well established rules of evidence. To admit secondary evidence, proof of the loss or destruction of the original document is a necessary preliminary. In the case of a missing deed its existence and contents must be proved, and also its due execution and delivery. A copy of a copy is not

Judgment.

received as evidence by a conveyancer any more than it would be in Court (*d*). Indeed many of the objections which are made to proceedings under the Act for Quieting Titles, as unnecessarily strict and particular, would never be made, were the practice of English conveyancers, and the strictness of proof required by them, better understood.

As the petitioner has failed to make out his title, the contestant need not be put to proof of his; but is entitled to the costs of the present proceedings.

(*a*) Taylor on Titles, 124.
(*b*) Lee on Abs. 215.
(*c*) Hubback on Suc. 62.
(*d*) Cov. Con. Ev. 313.

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Re Trusts of Turner's Will, Ex parte Seaton.

Money in Court for benefit of legatee—Jurisdiction, &c.

Where the amount of a legacy had been paid into Court, and the will directed that the legacy together with a house and lot also devised to the same person, should be held for the benefit of the legatee independently of her husband, she receiving the rents, interest, and profits: on a motion to have the money paid out, or that it might be invested in the purchase of a farm for the legatee's benefit: the Referee held it to be in the jurisdiction of the Court to make such an order, and granted the application as to the purchase of the farm, refusing it as to the paying the money to her absolutely.

[April, 1871.]

The testator, by his will, gave his niece *Alice Turner* (now Mrs. *Seaton*) a legacy of £1000. By a codicil, executed seven years afterwards, he devised a house and lot to her, and by a subsequent codicil he directed that the devise and legacy should be held by his executors for her benefit, independently of her husband, and not subject to his debts and liabilities, she receiving the rents, interest, and profits, and that it should after her death descend as she might appoint by her last will and testament; and in default thereof, to her heirs and next of kin respectively. One only of the executors named in the will took probate of it, or acted, and he paid the legacy into Court, under the Imperial Act 10 & 11 Vic. ch. 96.

Mrs. *Seaton* now applied to have the money paid out to her, or that it may be invested in the purchase of a farm, for her benefit.

Mr. *A. Hoskin*, for the applicant.

Mr. *Bain*, for the trustees.

Judgment

Mr. Taylor, Referee in Chambers.—I cannot order the money to be paid out to her absolutely. The

1871. testator's intention seems clear that she should enjoy the annual income derived from the gift during her life, the executors having control of the *corpus*.

Re Trusts of Turner's Will.

As to the alternative relief asked, the investment of this legacy in the purchase of a farm, I find no case exactly in point. Several cases relating to the investment of infants' moneys, however, afford an analogy, and seem to warrant an order being made for this purpose. In *Ashburton* v. *Ashburton* (*a*), Lord *Ashburton* having given certain specific legacies, bequeathed all the residue of his personal estate to his executors in trust, to place out the same, and the rents and profits of his real estate, in real or government securities as they should judge best, during his son's minority, and out of the produce thereof, or of any real estate, to pay what they should judge proper for his maintenance and education; the surplus to accumulate during his minority, and upon his attaining twenty-one to pay over the whole, principal and interest, to him or his order; but in case he should die under age, and the testator should have no other child who should attain that age, he gave a large legacy to his wife, and the residue with the accumulations to his sister. Soon after, the testator died, possessed of very large property in the funds, and on a petition being presented by the son, then a minor, suggesting an opportunity of laying out a considerable part of the money in the purchase of lands, near the rest of his landed property, and praying that he might be at liberty to lay proposals before the Master for investing the funds in land. Lord Chancellor *Eldon* granted the prayer of the petition, though at first he doubted whether the Court could make such an order when the will contained no directions for the purchase of land.

Judgment.

In the subsequent case of *Webb* v. Lord *Shaftsbury* (*b*), the testator devised certain estates upon trust, after

(*a*) 6 Ves. 6. (*b*) 6 Mad. 100.

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Re Trusts of Turner's Will.

certain payments, to lay out and invest the clear surplus of the rents and profits upon mortgage of real estate, or in government securities, and to accumulate the interest and dividends during the lives of certain parties, and he then disposed of such accumulations. A decree having been made to carry the trusts of the will into execution, the trustee presented a petition for leave to purchase an estate which lay contiguous to the other estates of the testator, and that if necessary he might be authorized to apply for an Act of Parliament to enable him to use the money. The Vice-Chancellor (Sir *John Leach*) held that he had jurisdiction to permit such an investment without any Act of Parliament, and ordered the purchase of the estate, if the Master should find that it would be beneficial to the parties interested.

In the present case the executors and trustees are to invest in "such stocks, funds, or securities as they may, in their discretion, think proper." This would warrant, in this country, at all events, an investment on mortgage of real estate. The present may therefore be treated as an application to invest the money upon the security of real estate.

Judgment.

The proposed investment appears to be a beneficial one. The money if invested in Dominion Stock, would, at the present high rate of premium for such stock, produce only a little over $200 a year. Mrs. *Seaton's* husband has been brought up on a farm and accustomed to farm work; he has sufficient means to stock a farm, if one is purchased, and the produce of the farm would yield more than the investment in Dominion Stock, and thus enable Mrs. *Seaton* and her husband to maintain their family more comfortably, and give them a better education.

Even in England, where the practice of the Court formerly forbade investments being made in any securities

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except those of the government, since the 23 & 24 Vic. ch. 38, sec. 10, permitted the Court to invest in other securities, an increase of the income of the tenant for life has been held a sufficient reason for converting an investment from government stock to other securities: *Peillon* v. *Brookings* (*a*). The *Equitable Reversionary Interest Society* v. *Fuller* (*b*), *Bishop* v. *Bishop* (*c*), and *Re Langford* (*d*) may also be referred to on this point.

The property to be purchased should be vested in two trustees, that being the number named in the will. One will not be sufficient, as the Court never hands over the control of trust property to a sole trustee: *Re Dickinson* (*e*), *Re Ellison* (*f*), *Mitchell* v. *Ritchey* (*g*); and this is the case even though only one has been named in the instrument creating the trust: *Re Tunstall* (*h*).

Judgment.

The trusts will be to permit Mrs. *Seaton* to receive the rents, income, and profits during her life, free from the control and liabilities of her husband, with a power to appoint by will, and there must be a direction that in default of appointment the land is to be considered as personal estate, and descend to her next of kin. It was suggested that in the event of land being purchased, it should be settled to Mrs. *Seaton* for life, with remainder to her children. I think this would not be proper, as it would be equivalent to her exercising her power of appointment by deed. This she has no power to do. Such an appointment would be bad, the testator having said "by her last will and testament": *Whaley* v. *Drummond* (*i*), *Reid* v. *Shergold* (*j*), *Anderson* v.

(*a*) 4 L. T. N. S. 731.
(*b*) 1 J. & H. 379.
(*c*) 9 W. R. 549.
(*d*) 2 J. & H. 458.
(*e*) 1 Jur. N. S. 724.
(*f*) 2 Jur. N. S. 62.
(*g*) 13 Grant 449.
(*h*) 4 D. & S. 421.
(*i*) Cited Sug. on Powers 210.
(*j*) 10 Ves. 370.

Dawson (*a*). A proposal for the purchase of a suitable farm may be brought in, the title investigated, and the conveyance settled in Chambers. 1871. Re Trusts of Turner's Will.

McManus v. Little.

Abstracts of title—Con. Orders 390, 391, 392, 393.

On receiving an abstract of title the purchaser has seven days within which to object to the completeness of the abstract, and after any question of its completeness is disposed of, and the abstract made perfect in the sense of being complete, seven days to object to the title; if, however, he takes his objection to the title in the first instance, the Master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title.

No objections other than those specifically taken will be entertained by the Master.

The indorsed receipts for consideration money should appear in a perfect abstract, at all events as to deeds executed before the late Registry Act.

[April, 1871.]

Mr. *Morphy* appeared for the purchaser.

Mr. *C. Moss*, for the vendor.

The points raised appear in the judgment.

Mr. Boyd, Master in Ordinary.—The purchaser's contention is, that having taken certain objections to the abstract, within seven days from its delivery, he is entitled to take other objections thereto, besides those first taken, upon proceeding in the Master's office under G. O. 390 and 391. This is a question of great importance, affecting all references of title (*b*), and has not been apparently, heretofore, determined under the New Judgment.

(*a*) 15 Ves. 532. (*b*) Ord. 396.

1871. McManus v. Little.

Orders. It is probable that my decision, however it goes, will be appealed against, and it is indeed desirable that such should be the case, that the rights of parties under the General Orders may not be in doubt. I have given the matter my best consideration, but must confess at the outset that I am not thoroughly satisfied with my own conclusions.

Under the present practice of the English Court of Chancery, one of the ordinary conditions of sale is that each purchaser is, within a certain number of days after delivery of the abstract, to deliver to the vendor's solicitor a statement in writing of his objections and requisitions (if any) to or on the title, as deduced by such abstract; and upon the expiration of such time (and in this respect time is to be deemed of the essence of the contract) the title is to be considered as approved of and accepted by such purchaser, subject only to such objections and requisitions, if any (*a*). This practice was in force some five years before our Consolidated Orders, wherein appears an entirely new series of Orders relating to references of title. I think that these Orders, though original in form, are intended to operate restrictively in the same way, and produce the same result as the standing conditions of sale in England. The language is not so explicit as, though more comprehensive than, that employed in the English conditions of sale; but the intention is unmistakeable.

Judgment.

By our Orders the questions before the Master are separated into two distinct parts: (1) as to the abstract and its sufficiency, being that part of the inquiry which is to determine if a good title is *shewn* (*b*); and (2) as to the proof of the abstract, being that part of the inquiry which is to determine if a good title is *made* (*c*).

(*a*) See Biddle's Forms. (*b*) Ord. 390, 391, 392, 393.
(*c*) Ord. 394, 395, 396. See Parr v. Lovegrove, 4 Drew. 170.

1871.

McManus v. Little.

The matters at present in dispute arise under the first branch of inquiry. It will be observed that the Orders relating to this, speak only of "objections" to the abstract; the Orders relating to the second branch of investigation, speak of "objections and requisitions" to the title. "Objections" will refer to matters objectionable or defective on the face of the abstract, and will include all questions upon its sufficiency and its perfectness, as to the documents or matters set forth, and as to the title exhibited.

It has been held under ordinary conditions of sale out of Court, that the stipulation as to objections being taken within a certain number of days after delivery of the abstract, and as to objections not so taken, that they shall be considered waived, becomes operative only when, and not before a perfect abstract has been delivered: *Hobson* v. *Bell* (*a*). The term "perfect" thus used is apt to mislead. In *Morley* v. *Cook* (*b*), it is said that a perfect abstract, in the strict sense of the term, would shew a good title; but it may mean the most perfect abstract in the vendor's possession (actual or constructive) at the time of his delivering it. The best definition of what is involved in the delivery of an abstract, is that by V. C. *Kindersley*, in *Oakden* v. *Pike* (*c*), who says: "It is the furnishing by a vendor of a document which contains, with sufficient clearness and sufficient fullness, the effect of every instrument which constitutes part of his title." The abstract must be complete, or it is not the delivery of an abstract in point of fact: if the documents are not abstracted sufficiently to enable the purchaser to judge whether a good title is shewn by it or not, then it is not a full or complete abstract. And so in *Steer* v. *Crowley* (*d*), the condition of sale was, that on the tenth day after sale the vendor would

Judgment.

(*a*) 2 Beav. 17.
(*b*) 2 Ha. 112.
(*c*) 11 Jur. N. S. 666.
(*d*) 9 Jur. N. S. 1292.

1871.

McManus v. Little.

deliver to the purchaser an abstract of title. By this, *Erle*, C. J., said, must be understood a full and fair abstract; one not absolutely perfect, necessarily, but a fair abstract of all the documents in the vendor's possession, and on which he relies. And so the rule is laid down in *Dart*, that the non-delivery of a perfect or sufficient abstract on the day named, discharges the purchaser from any conditions binding him to make objections, &c., within a specified time after the delivery of the abstract. Now by Order 390, if the purchaser does not serve objections to the abstract delivered, within seven days, he is to be deemed to have accepted it as sufficient. Upon this there can be two classes of objections made, as I conceive; (1) that the abstract is not complete in the sense that V. C. *Kindersley* attaches to the epithet, viz., that the documents are not sufficiently abstracted so as to enable the purchaser to judge of the title, or to make objections to the title endeavoured to be shewn in the abstract. If objections are made to the completeness or sufficiency of the abstract in this sense, and, upon answers thereto being given, the purchaser is dissatisfied and the parties cannot agree out of Court, then the Master is, upon warrant obtained by either party, to determine such questions as have been raised on the abstract, in this point of view, and are in issue between the parties; and he is to decide upon the sufficiency of the abstract, in view of such objections. If the Master decides against the objections, and holds that the abstract is complete, and that decision is confirmed, then the seven days from the delivery being up, no further objections can be made by the purchaser, and he will be deemed to have accepted the abstract, as against all objections thereto, unless he has objected as well to the sufficiency of the abstract as to the sufficiency of the title shewn by it, in which case, upon the former objections being overruled, the latter would take effect and call for decision. If the Master holds the objections valid, then he is, on the purchaser's application, to

Judgment.

require the vendor to supply the defects, and to make the abstract as perfect or complete as he can. And upon a sufficient supplemental abstract being brought in, which the Master, if required, is to certify as perfect, or as perfect as the vendor can make it, the purchaser will have, under Order 390, seven days within which to make objections to the completed abstract. These the parties will then endeavour to settle out of Court; and if they fail will again come before the Master upon questions of title, as will be presently adverted to.

1871.

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The second class of objections will be, when a complete abstract is delivered at the outset; then the purchaser can serve objections to the title shewn by the abstract. The abstract may be sufficient in exhibiting the vendor's title, as it really is, but that title may be defective (*a*). The first class of objections is as to the form of the abstract: this class, as to sufficiency of the title manifested. Now if no such objections are made at all, then the abstract is accepted as sufficient, in the sense of a satisfactory title being shewn. If one or more such objections are served within the seven days, then the abstract is open as to these, but is to be deemed accepted as sufficient as to all other objections not raised within the time. That is, I think, the fair meaning of the order. If the parties then cannot be at one as to these objections, they come before the Master upon his warrant, and he will determine all questions upon the abstract. All what questions? Manifestly those upon which the parties are disagreed, and upon which the purchaser is dissatisfied. Every possible objection is not then open to the purchaser, as was here contended. It is said that the Master is to go into the whole abstract, and ascertain if it is perfect. I decline this responsibility, till it is expressly put upon me by the Court. It cannot have been intended by these Orders that the

Judgment

(*a*) See Blackburn v. Smith, 2 Exch. 784.

1871. McManus v. Little. Master should wander at large over the abstract, and investigate all difficulties and search out all defects that have not been specifically objected to within seven days after the delivery of the abstract. I think the Master is only called upon to certify on the abstract, as to its perfectness, when it comes into his office upon that issue, viz., whether the abstract, as delivered, is full, fair, and sufficient in its setting forth of the documents, and he is then only to satisfy himself as to those particulars which have been pointed out in the objections. And similarly as to objections to the title shewn by the abstract, he is not to make a report, but is to mark his allowance or disallowance in the margin of *the* objections. What objections, if not those on which the parties were disagreed before coming into his office? *Cockenour* v. *Bullock* (*a*); *Green* v. *Monks* (*b*).

Judgment. Under these orders then, as I construe them, the Master has to determine, according to circumstances, and upon the particular points in question, (1) whether the abstract delivered is complete or not, and thereupon allow or disallow all objections raised and unsettled out of Court, as to its sufficiency in form; (2) if he disallows the objections, he is to certify that the abstract is perfect (*i. e.* as against the objections), and if the seven days have elapsed, then the purchaser cannot object on any ground to the abstract, unless he successfully appeals from the decision, or unless he has also objected to the title manifested in the abstract; (3) if the Master allows the objections, then he is, at the purchaser's request, to require the vendor to make the abstract as perfect as he can, and when this is done, he is to certify to that effect, and then a new point of time is given for making objections to the new and complete abstract; (4) when a proper abstract is delivered, he is to determine the questions raised upon the objections as to title

(*a*) 12 Gr. 78. (*b*) 2 Moll. 825.

or conveyancing in respect of it, and to allow or disallow them (in such case, not certifying on the abstract at all, as to its perfectness, which, as I take it, belongs to a prior stage of inquiry). Now in the present case the objections are of a miscellaneous character, some merely technical to the form of the abstract, some regarding its verification, which are premature, and one only which is to the completeness. It is objected that the proceedings in a Chancery suit are not set out; in this respect, I think the abstract is insufficient, and I direct it to be remedied. The other objections should be disallowed, or, perhaps, considered as irrelevant at the present stage of inquiry, except the first, which is really of no consequence. Upon the abstract being amended, I shall hear the parties and determine whether it is as perfect as the vendor can make it, in view of these objections, and certify accordingly, if the purchaser so desires.

1871.

McManus v. Little.

Judgment.

After pronouncing the above opinion, Mr. *Morphy* called my attention to another objection made, viz., that the receipts for the purchase money were not set out. After hearing the parties, and considering the state of the authorities, I think it best to give effect to the objection, and hold that the abstract is in this respect incomplete. Apart from the books, I should have thought that the endorsed receipt was only a strong piece of evidence going to the verification of the abstract in proving the payment of the consideration—the absence of which might indicate that the vendor had a lien for the purchase money; but the statements in such text text books as *Preston*, *Stewart* (*a*), *Bythewood* (*b*), *Dixon* (*c*), and *Sugden* (*d*), shew that these authorities consider that endorsed receipts should be abstracted, and that the course of practice has been such for a long

(*a*) On Conveyancing, vol. iii. p. 21.
(*b*) Vol. i. p. 98.
(*c*) On Title Deeds, p. 447.
(*d*) V. & P. 409.

1871. McManus v. Little.

series of years. I therefore allow this objection. See *Drummond* v. *Tracy* (*a*), *McDonald* v. *McDonald* (*b*), disposes of the objection made by Mr. *Moss*, that the reason for regarding endorsed receipts no longer exists.

LAWRASON v. BUCKLEY.

Purchaser—Costs—Vesting order.

Where in a suit by creditors to set aside a settlement, lands were ordered to be sold, and the proceeds paid into Court; a purchaser after confirmation of sale paid his money into Court, and had his conveyance prepared and tendered for execution to the trustees, who were absent from the jurisdiction, and who refused to execute it; a vesting order was granted, and the costs of the motion were ordered to be paid out of the fund in Court.

[April, 1871.]

Mr. *Cassels*, for the purchaser, cited: *Paramore* v. *Greenslade* (*c*), *Bradley* v. *Munton* (*d*), *Ayles* v. *Cox* (*e*).

Judgment.

MR. TAYLOR, REFEREE IN CHAMBERS.—The report on sale stands confirmed, and the purchaser has paid his purchase money into Court. No objection is made on the part of the vendor to so much of the present motion as asks for a vesting order. The purchaser, however, asks further, that the costs of the present application should be paid out of the fund in Court, and this the vendor opposes.

The suit is brought on behalf of creditors to set aside a settlement made by the debtor, and by the decree the lands were ordered to be sold for payment of the debts. A conveyance has been prepared, settled between the

(*a*) Johns 608.
(*b*) 14 Gr. 133.
(*c*) 1 Sm. & G. 541.
(*d*) 16 Beav. 294.
(*e*) 17 Beav. 584.

parties, and tendered for execution. The three trustees (defendants) in whom the legal estate is vested are all now resident in the United States. They refuse to execute the conveyance, one of them insisting upon being paid $200 before he will execute. As they are all out of the jurisdiction, the purchaser has no means of compelling them to convey, and therefore he applies for a vesting order. I think he is entitled to the order, and also to the costs. The authorities cited on behalf of the purchaser seem quite in point. In another case, *Billing* v. *Webb* (*a*), where lands had been sold in an administration suit, the heir-at-law, a married woman, refused to acknowledge the deed unless paid a sum of money, which the purchasers did pay to her, and the Court ordered repayment to the purchasers of the money so paid, and also gave them their costs of the petition for obtaining such repayment.

1871.

Lawrason v. Buckley.

The usual condition of sale, that the purchaser is to prepare the conveyance at his own expense and tender the same for execution, does not preclude the purchaser from obtaining what he now seeks. Where lands were sold under conditions of sale which informed intending purchasers that the legal estate was vested in an infant, Vice Chancellor Knight *Bruce* held that the purchaser was entitled to the costs of having the conveyance settled by the Master; the necessity for that being occasioned by the infancy of the heir, *Brown* v. *Lake* (*b*). That case has been followed in this country, *Rodgers* v. *Rodgers* (*c*).

Judgment.

In *Brown* v. *Lake* the costs given were those arising from the infancy alone. Here all the costs of the present application have been occasioned by the conduct of the trustees. Had the purchaser applied for a vesting order in the first instance, he would have had to bear the costs

(*a*) 1 D. & S. 716.
(*b*) 15 L. J. ch. 34.
(*c*) 2 Cham. R. 241.

1871. Lawrason v. Buckley.

himself, for that would have been equivalent to doing what the conditions of sale require him to do, "to prepare the conveyance at his own expense;" he did prepare a conveyance, and all the costs incurred thereby having been rendered useless by the conduct of the trustees, the purchaser should not now have to bear the additional costs of the vesting order.

These costs will be paid not out of the funds in Court generally, but as in *Ayles* v. *Cox*, out of the purchase money paid in in respect of the particular parcel in question.

1871.

WALKER v. WALKER.

Security for costs—Next friend.

Held, qualifying *McBean* v. *Lilley*, 2 Cham. R. 247, as the decision in that case is stated in the head note: that the affidavit of a next friend that he is worth $400 over and above all his debts, is only *prima facie* proof of his sufficiency as a next friend, and that evidence as to his circumstances may be given.

Where evidence contradictory to the affidavit was adduced, which in the opinion of the Court outweighed this statement, security or a new next friend was ordered.

[April 28, 1871.]

Mr. *Snelling* moved, on behalf of the defendant, that all further proceedings in this cause be stayed until the plaintiff should procure a sufficient solvent and substantial person, capable of paying costs, as her next friend, the presently appointed next friend not being a substantial person capable of paying costs; or, in the alternative, that the plaintiff should be ordered to find security for the costs of this suit. Statement

Mr. *Downey*, contra, contended, on the part of the defendant, that the evidence clearly shewed the person named as next friend was not solvent; that his own affidavit as to solvency was insufficient; that evidence was admissible to rebut his affidavit: and he referred to *McBean* v. *Lilley* (*a*), *Smith's* Practice, 563; *Sharpe* v. *Sharpe* (*b*) (as distinguishing this case from that of infancy); and it was also submitted that the fact that the present next friend was the plaintiff's trustee did not affect the question raised by the present application.

The facts appear in the judgment.

(*a*) 2 Cham. Rep. 247. (*b*) 2 Cham. Rep. 244.

1871.

Walker v. Walker

MR. TAYLOR, REFEREE IN CHAMBERS.—The next friend of the plaintiff, a married woman, is objected to, and his removal is sought by the defendant because he is not a person of substance. His removal is opposed because he is trustee for the plaintiff in respect of the matters in question in this suit and because he is possessed of sufficient means.

The bill is filed by *Mary Walker* by her next friend against her husband, claiming that under a separation deed made between herself and her husband by way of settling a suit for alimony, she is entitled to an annuity of $80 a year; alleging that the annuity is in arrear and praying that the land upon which it is charged or a sufficient part of it may be sold to satisfy these arrears. The person who is the next friend is not the original trustee appointed by the separation deed but a brother of the plaintiff's, who has been substi-

Judgment.

tuted in the place of the trustee originally appointed. No answer has yet been filed, but the defendant swears that he has a good defence on the merits, and from his affidavit filed on this application it appears that since the execution of this separation deed the plaintiff and he have lived together and he claims that on this account her right to the annuity is at an end. He further denies that there are any arrears due, and says that when the plaintiff left him the second time she took with her a large sum of money belonging to him far more than sufficient to pay the costs of certain unsuccessful proceedings taken by him to have this deed set aside, and which she claims are still unpaid. He further alleges that he never agreed to the change of trustees, but on the contrary objected to the present next friend being appointed in substitution for the original trustee.

The next friend, however, is not before the Court here in his character of trustee. The bill is not filed

1871.

Walker v. Walker.

by Mrs. *Walker*, and her trustee as plaintiffs, but by *Mary Walker* as sole plaintiff, "by *Michael Gallagher*, her next friend." Even if he were joined with her as co-plaintiff it would still be necessary for her to have a next friend. This would be the case if she and her husband as jointly interested had brought a suit as co-plaintiffs, *(a)* and when a next friend is necessary he must be a man of substance. *(b)* Here there is no doubt a next friend is necessary.

The question of the solvency of the next friend has still to be considered. He has filed an affidavit in which he says he is worth property to the amount of $400 and upwards over and above what will pay all his just debts. This property consists of money, furniture in and about his house and also an interest in a leasehold property, consisting of a house and four acres of land in the City of Ottawa, on which he resides as tenant at a nominal rent of $8 a year and taxes.

Judgment.

In *McBean* v. *Lilley*, *(c)* it is, according to the head note of the case, sufficient if the next friend swear, as he has done here, that he is worth £100 over his debts, and if he does so, the question of his solvency or insolvency will not be gone into. The judgment of the present Chancellor in that case, however, scarcely warrants so strong a statement. From the judgment it appears that the motion was in that case refused, the learned Judge holding that it was "shewn" the next friend was worth £100 over and above all his debts, and that was all that could be asked for, viz: his being worth £100 over and above all his debts. Nor can I say, on the evidence before me, here that this man is worth a £100 over and above all his debts; he swears that

(a) Blackburn v. McKinley, 3 Cham. R. 65.

(b) Rann v. Lawless, Cham. R. 333; Vanwinkle v. Chaplin, 2 Cham. R. 98.

(c) 2 Cham. R. 247.

1871.

Walker v. Walker.

he is, his property consisting of money, furniture, and chattels in his house, and his interest in a leasehold property in the City of Ottawa; but two of his neighbors are examined, and they give a somewhat different account of his circumstances. They say that he is a daily laborer with a wife and family of children, receiving $7 a week wages, for which he has to work every day, including Sunday; that he has nothing in his house, and no property beyond what is exempted from seizure by the Act relating to exemptions, except one stove and a cow. The leasehold interest in property which he has, is that he holds a lease for one year of a house and four acres of land, at a rental of $8 a year, from the estate of Colonel *By*. One of these neighbors, *John Tye*, says that after excepting the two cows, which are worth from $25 to $30 a piece, he would not give $20 for all he has in the world. The other, *John Black*, says, he knows that his earnings are hardly sufficient to maintain him and his family; and he has often heard this from him and from his wife; and he *(Black)* has often had to lend him small sums of money to help him in supporting his family, as he could not wait until his next monthly pay-day came round.

Judgment.

In the face of such affidavits as these, I cannot hold *Gallagher* to be a sufficient next friend. I must therefore order that security for costs be given, or a new next friend appointed; and that in the meanwhile proceedings be stayed.

1871.

RE DAVIS.

Custody of child under twelve years of age.

The Court has an absolute right in its discretion to give the custody of a child under twelve years of age to the mother.

The Court exercised this right where the only evidence that the parents were living apart through the fault of the husband, was the evidence of the wife; holding, that the Court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is, on her own statement, justifiable; and the Judge is not prepared to say that he disbelieves such statement.

[March 22, 1871.]

This was a petition by the wife of the respondent praying that their child, a girl under seven years old, might remain in her custody, and that the respondent, the father, might pay for the child's maintenance.

Statement.

The petitioner and respondent were married on the 4th August, 1863, and had been living separate since May, 1869. The petitioner had no means whatever for the support of herself or their child, and had not had during this period. She was in delicate health, unable to earn a livelihood for herself; and, since the separation, both the wife and child had been living with, and been maintained by, the wife's parents. She attributed her separation from her husband to his vicious habits, and to his cruelty, and ill-treatment of her. She alleged, that his conduct had undermined her health: that when she was taken by him to her father's house in May, 1869, she was supposed to be in a dying state; and that her illness was the result of his conduct towards her. On the other hand, in the husband's affidavit, he denied every material charge which she had made against him. Other affidavits had been filed on both sides; and the inference from the whole appeared to the Court to be, that, if there was the ill-treatment of which she complained, it was when no third person was present.

1871.

Re Davis.

Mr. *Crooks*, Q.C., appeared for the petitioner.

Mr. *Tilt*, contra.

MOWAT, V. C.—By desire of counsel on both sides, I have had a personal interview and considerable conversation with each of the parties; and the result has been to satisfy me, that there is no prospect of their again living together soon, if ever. The husband seemed to me to have little, if any, desire or expectation that they would; and the wife seemed to shrink with the greatest repugnance and dread from the idea of again attempting to live with him, whatever might come of the present application. The affidavits shew that this is the third occasion they have lived for a time apart; the first time was for a week; the second time for seven months; and the last time has been for nearly two years. What, under such circumstances, should be done on an application like the present?

Judgment.

According to the construction which the Imperial Act, 2 and 3 Vic., ch. 54, has received, it must be considered that, under our Act, the court has an absolute discretion to give the custody of children under twelve to the mother (*a*). In the exercise of this discretion, where the parents are living apart through the fault of the husband, the custody of the children is generally given to the mother (*b*). But it has been held, that, to justify an order to that effect, where the living separate is the voluntary act of the wife, it is not indispensable that there should be proof, satisfactory to the Court, that she is living separate for reasons which, in England, would entitle her to a divorce, either a *vinculo* or a *mensa et thoro* (*c*).

(*a*) Shillito v. Collett, 8 W. R. 683, S. C. Ib. 696; Warde v. Warde, 2 Ph. at 791.

(*b*) Re Tomlinson, 3 De G. & Sm. 371. (*c*) Re Bartlett, 2 Coll. 661.

One object of the Act has been explained to be, the protection and interest of the children (*a*). *Curtis* v. *Curtis* (*b*), in which a general jurisdiction to that effect was disclaimed by the Vice Chancellor, was not a case under the Act, the children there being over seven years old, the age to which the English Act is limited.

I have no doubt that it will be greatly for the interest of this little girl, that she should remain with her mother. Indeed, the respondent has acted on that view; for he has made no attempt to obtain the custody of her; for several months he has intimated no desire even to see her; and counsel on his behalf did not attempt to argue on the affidavits, that it would not be better for the child that her mother should continue to have the custody of her. Affidavits could not be more satisfactory on this point, than are the affidavits filed on behalf of the petitioner. Thus, the Rev. Canon Baldwin makes an affidavit, in which he states that he has known her parents and herself, and also her husband, for many years. Speaking of her and her parents, he deposes, that he fully believes them to be most respectable and worthy members of society; and that he is persuaded that Mrs. *Davis* is incomparably better qualified in a moral and religious point of view, to have the custody and training of her daughter than her husband would be. Other respectable and credible persons testify to the same effect; and there is no evidence of an opposite kind.

Judgment.

Where it is for the interest of a child to be with the mother, it is hard towards the child that the mother should not have her, whatever may be the cause of the difficulty between the parents; but if the father's conduct towards his wife and child is shewn to have been open to no imputation; if the wife has left him

(*a*) Re Halliday, 17 Jur. 56. (*b*) 5 Jur. N. S. 1147.

1871. Re Davis. from mere caprice and wilfulness, and the Court is satisfied of that, the father's common law right to the custody of his child seems to be recognized since the Act as before.

Where the Court is not satisfied that the separation was unjustifiable on the part of the wife, but she has not been able to prove by independent evidence that there were facts which justified it, what then? Is the position of a wife and child, under the Act, helpless wherever, for example, the husband's misconduct is concealed from third persons? I am not prepared so to hold. I think that it will be a more sound rule for the exercise of the discretion which belongs to me in this jurisdiction, and that it will be in accordance with the decided cases, to say, where the Court is satisfied that it will be for the interest of the child to be in the custody of the mother, that the Court may in its discretion, in view of all the circumstances, direct the custody to be given to the mother in case the cause of her living apart is, on her own statement, justifiable, and the Judge is not prepared to say that he disbelieves that statement. Every case must depend on its own circumstances.

Judgment.

The marriage of these parties was a marriage of affection, as each of them took occasion to tell me. The husband said that they had been "keeping company" for three years before their marriage; and that his means had enabled him, and would still enable him, to keep her in greater comfort than, from her father's narrow income, she has ever known in her father's house. If all that is so, and if the husband has always treated his wife properly, how is it that she is now so unwilling to live with him? Why is it that her parents desire to burden their narrow income with her maintenance? and why is it that the wife and her parents voluntarily bring on them-

selves the reproach and unhappiness to all parties which are inseparable from the separation of a man and his wife? Looking at the affidavits and all the circumstances, I am not prepared to say, that the wife's explanation of the separation is not more probable than any other. A comparison of the appearance and demeanour of the parties (which my interview with each of them enabled me to make) did not in my mind help the case of the husband. 1871. Re Davis.

I think, on the whole, that the mother should have the custody of their daughter, and that provision should be made for the father seeing the child at stated times,—which I shall settle, if the parties cannot agree about them.

Our statute authorizes the Court to provide for the maintenance of the child by the father while she is in her mother's custody. He represents his annual income to be $865, part ($350) from his office as a city assessor, and the rest (as I understand) from property. His wife, in her affidavit, named $1000 as his income, and $200 as a reasonable allowance for the child. The reasonableness of the sum named for the allowance, is not disputed in the affidavits filed by the respondent. On the whole, I think that he should pay her $15 forthwith, for the month which commenced 1st March, and $15 on the first day of every month hereafter, (commencing with the 1st April), until the child is twelve years old, or the Court makes other order in the premises. Judgment.

The Court subsequently directed that the petitioner should be paid the costs of the application.

1871.

RE PRINCE.

Taxation of costs—County Court—Jurisdiction.

Where a solicitor has funds of a client in his possession, or has papers over which he claims a lien, he is subject to the summary jurisdiction of this Court, which will order delivery and taxation of his bills, and the payment over of any balance, notwithstanding that the services for which he claims have been wholly in County Court proceedings.

[April 5, 1871.]

Statement.

This was an application on petition by the assignee of an insolvent, asserting that the respondent, a solicitor of this Court, was employed by the insolvent to collect a debt in a County Court; that the respondent did collect the debt; but that he claimed to retain out of the money a commission of ten per cent., besides his costs. The prayer of the petition was, for the delivery and taxation of the solicitor's bill, the payment to the petitioner of the balance to which he was entitled, and the delivery up of all papers.

Mr. *Holmested*, on behalf of the client, applied before the Referee for the delivery and taxation of the bill of costs and payment of any balance in the hands of the solicitor.

Mr. *Foster*, for the solicitor, objected on the ground of want of jurisdiction. It appeared from the petition that the whole of the bill was for services in County Court suits. He cited *Re Cameron* (*a*), and urged delay and acquiescence, the bill having been rendered in April last; also that the application should have been for an order to tax only, the bill having been already delivered. Mr. *Foster* also complained that the thirteenth paragraph of the petition was scandalous in charging neglect to the solicitor, a charge totally unsupported by evidence, and contended such paragraph should be struck out;

(*a*) 1 Cham. R. 356.

also that if such an order was regular at all, it could be obtained *ex parte*. 1871.

Re Prince.

Mr. *Holmested*, in reply. *Re Cameron* is not in point, it did not appear in that case as it does in this, that any fund was in the hands of the solicitor; the language of the judgment implies that if there had been, the decision would have been different. In England the practice is defined; there you must apply in the Court in which the business has been done; we have no such provision here. The Courts have concurrent jurisdiction, and this Court can entertain such an application although no business has been done, and no suit brought here. The only delivery of the bill sworn to is that to *Clarke & Clayton* after they had assigned to *Watson*.

THE REFEREE IN CHAMBERS refused the application on the ground of want of jurisdiction. From this decision the petitioners appealed, and the appeal was heard before *Mowat*, V. C., the same counsel for the respective parties appearing as before the Referee. Judgment.

Mr. *Holmested* took the same grounds as on the former argument, and argued further, that a practitioner appears in the County Courts only in virtue of his being a solicitor of this Court or an attorney of the Common Law Courts; this Court has therefore jurisdiction over him; he is subject to summary proceedings if he misconducts himself; and the Court can order a taxation of his bill of costs. If forced into the County Court, the petitioner would not have the benefit of these summary proceedings for obtaining the payment over of the money in the solicitor's hands. He referred to the County Court Act (*a*); *Pullen* on Attorneys. p. 2.

Mr. *Foster* made the same contention as when before the Referee, and relied on the authority of *Re Cameron* (*b*).

(*a*) Consol. Stat. ch. 35, sec. 38. (*b*) 1 Cham. R. 356.

1871.

Re Prince.

MOWAT, V.C.—In *Re Cameron (a)* the present Chancellor held, that this Court has no jurisdiction to order the taxation of a bill of costs incurred in the County Court, where the solicitor claims no other costs, and "it does not appear that that he has any fund in his possession to which his client is entitled, or any papers of the petitioner on which he claims a lien." Where either of these circumstances occurs, the petitioner contends, that the Court has jurisdiction; and the contention appears to me to be correct.

Judgment.

The Court has a general jurisdiction over its solicitors, to order the payment of money received by them in their professional character, even though there had been no suit *(b)*; and the taxation of any costs which the solicitor may claim is incidental to the exercise of that general jurisdiction, and is independent of the provisions of the Act respecting Attorneys-at-Law *(c)*. The circumstance that this money was received by the solicitor by means of a suit in the County Court does not seem to make any difference. One Superior Court has jurisdiction to enforce undertakings and obligations assumed in suits in another Superior Court *(d)*. In *Evans* v. *P——(e)*, the Court of Common Pleas, in England, held that if any attorney of that Court does anything *quatenus* an attorney in an Inferior Court, the Superior Court interferes. In *Carruthers* v. ——— *(f)*, the Court of King's Bench here held, that an attorney of that Court, practising in the District Court, was liable to an attachment for not paying over money received for his client in a District Court suit. It is as being an attorney and

(*a*) 1 Chamb. R. 356. See also Re Jones, 3 U. C. L. J. 203; Re Forsyth, 2 DeG. J. & Sm. 509.

(*b*) Re Barker, 6 Sim. 476; Mawhood v. Milbanke, 15 Beav. 36; Re Becke, 18 ib. 462; Re Catlin, 27 ib. 511; Re Lawrence, 2 Sm. & G. 367.

(*c*) Consol. Stat. U. C. ch. 35, 27, 28, &c.

(*d*) Re Paterson, 1 Dowl. 468; Re Greaves, 1 Cr. & Jr. 376 n.; &c.

(*e*) 2 Wils. 382. (*f*) Tayl. 243.

solicitor of the Superior Courts that the respondent practises in the County Courts (*a*). Those courts have no attorneys' roll of their own. 1871. Re Prince.

But it is discretionary with this Court whether to exercise the jurisdiction *(b)*. It was stated for the petitioner, and not disputed, that proceedings here for the purpose in view are simpler and more speedy than at common law; and if they are so, I do not perceive any solid ground on which I can refuse to make the order asked.

RE KEENAN.

Sale of equity of redemption under execution.

Under the Statute authorizing the sale under execution of the mortgagee's equity of redemption, Consol. Stat. chapter 22, the sheriff cannot sell or convey any interest, if there is a second mortgage outstanding in the hands of different parties.

Where a first mortgagee acquired, as he contended, a title through a purchaser at sheriff's sale of the equity of redemption of the mortgaged premses, there being mesne incumbrances it was held that he did not acquire the fee in the lands, the sheriff not having power to sell.

[April 31, 1871.]

This was a proceeding under the Act for Quieting Titles.

The parcel of land in question having been, with other lands, sold under an order of the Court, in the matter of *Robert Keenan*, a lunatic, an order was made for the investigation of the title under the Act

(*a*) Consol. U. C. ch. 35, s. 1.

(*b*) Exp. Hicks 2 D. & C. 575, 576; Re Garland, 6 Dowl. 512; Re Toms & Moore, 3 Chamb. R. 41.

1871. for Quieting Titles to Real Estate, with a view of granting to the purchaser a conveyance under the thirty-second section of that Act.

Re Keenan.

The lunatic derived his title from *Francis Morrow*, who became the purchaser at a sheriff's sale, under an execution against *McBride*, the then owner of the land, and received a conveyance from the sheriff. The state of the title, so far as material to the question now to be disposed of, was as follows: *Patrick Doyle*, who at one time owned the land, made a mortgage in 1849 to *Jeremiah Hogan*, and afterwards conveyed his equity of redemption to *Keenan*, who, in 1855, sold and conveyed to *Lawrence McBride*. Between 1855 and 1857 *McBride* made three mortgages to *Keenan*, then, in 1859, he mortgaged to *McLaughlin*; and on the 14th of August, 1861, he made a fifth mortgage to *Thomas Curren*. On the 21st of October, in the same year, the Sheriff of Simcoe under an execution against the lands of *McBride* placed in his hands on the 26th of July, 1860, and regularly renewed, sold, and conveyed to *Francis Morrow*, who, in September, 1864, conveyed to *Keenan*.

Statement.

The mortgage from *Doyle* to *Hogan*, although no certificate of discharge had been signed, had in fact been paid up, and was no longer an incumbrance upon the land. *Hogan* was examined as a witness, and he said, that default having been made he caused proceedings to be taken to enforce payment; what steps his solicitor took he did not know, but they resulted in his being paid in full; no discharge of the mortgage had ever been presented to him for execution, but he had no claim whatsoever upon the land.

Mr. *J. Hoskin*, for the claimant.

Mr. *Foy*, for the contestant, cited *Donavan* v. *Bacon* (not reported); and *McLaren* v. *Fraser*. *(a)*

(*a*) 15 Grant, 239.

MR. TAYLOR, REFEREE IN CHAMBERS.—The first question raised before me was, whether *Keenan* should be considered standing in the place of *Morrow*, and bound under Consol. Stat. U. C., chapter 22, sections 258 and 259, to pay off the mortgages of *McLaughlin* and *Curren*. The more correct view of *Keenan's* position seemed to me, to be, to consider *Morrow* as under the sheriff's deed standing in the place of *McBride*, the owner of the equity of redemption, and *Keenan*, a mere mortgagee, obtaining from *Morrow* a conveyance of the equity of redemption, so that his mortgage debt did not, under Consol. Stat. U. C., chapter 87, section 1, merge as against *McLaughlin* and *Curren*, the subsequent mortgagees; I, however, directed notice of the present proceedings to be given to both *McLaughlin* and *Curren*. 1871. Re Keenan.

Curren has, in consequence of the notice served upon him, filed a claim, setting up that he is a mortgagee of the land in question. Judgment

For the lunatic it is contended, that the writ under which the sheriff sold to *Morrow* having been placed in the sheriff's hands prior to the sale of *Curren's* mortgage, the subsequent sale by the sheriff related back to the time when the sheriff received the writ: and thus *Curren's* mortgage is entirely cut out.

Curren, on the other hand, attacks the validity of the sheriff's sale, because at the time the sheriff received the writ, and when he sold under it, there were several mortgages on the land, outstanding in different hands, and on this account it is said the sheriff had no authority to seize or sell.

The case of *McLaren* v. *Fraser*, (*a*) cited by the counsel for *Curren*, is not in point. The sheriff's sale

(*a*) 15 Gr. 289.

1871. there was impeached because several lots being em-
Re Keenan. braced in the mortgage the sheriff had sold part only, and not all. The question there raised had previously been decided against the validity of such a sale, in *Heward* v. *Wolfenden*, (*a*)

The case of *Donovan* v. *Bacon*, decided by the late Chancellor *Vankoughnet*, in September, 1868, is a direct authority in favor of *Curren's* contention. In that case, the owner of a lot of land having made two mortgages upon it, to different mortgagees, the sheriff sold the equity of redemption under an execution against the mortgagor. The assignee of one of the mortgagees afterwards filed a bill against the original mortgagor and the purchaser at sheriff's sale, to enforce payment of his mortgage. Both the defendants answered the bill, the mortgagor submitting that the purchaser at sheriff's sale was, under the Consol. Stat. U. C., chapter 22, section 259, bound to pay off the
Judgment. mortgage, and to indemnify him against any claims in respect of it.

When the cause came on for hearing, it being admitted that at the time of the sheriff's sale there were two mortgages in different hands, the learned Chancellor stated his opinion as follows: "Can the sheriff in such a case sell the equity of redemption, under sections 258 and 259 of chapter 22 of the Consol. Stat. of U. C.? The language of the 258th section would be wide enough to cover such a sale, but read in connection with the 259th section it seems to me that the Legislature were intending to deal with the simple case of one mortgagor and one mortgagee, and that they did not intend the equity of redemption to be sold where there was more than one mortgagee; for, while they declare in this section that any mortgagee may purchase, they provide that he shall give to the mortgagor a release

(*a*) 14 Gr. 188.

of the mortgage debt. Whereas if any other person becomes the purchaser he shall pay off the mortgage debt, or perhaps mortgage debts, if the clause had reference to such a purchaser only. But it would be meeting out scant justice to the mortgagor, that when a mortgagee, if he become the purchaser, should alone be required to release his own debt, for he of course could not release debts charged on the estate due to another, yet that a stranger purchasing must pay off all the incumbrances. 1871. Re Keenan.

Without saying that a mortgagee might not render himself liable to pay off the incumbrances, (unless saved by the statutes relating to tacking and mesne charges), yet, I think that these distinctive provisions of the statute to which I have just referred, in connection with the language of those sections which speak only of a single mortgage, indicate that the Legislature only intended to deal between mortgagor and the one and the same mortgagee, and this construction of the statute is in accordance with the views taken by the Court on other questions arising under it. I do not mean to say that when one mortgagee holds two mortgages instead of one, the statute could not be applied." Judgment.

The point in dispute being then, expressly decided by the late Chancellor, I am bound to find, that the sheriff had not, under the circumstances of the present case, any power to sell; that *Keenan* is not the absolute owner in fee of the land. His rights as the first mortgagee, are not, of course, in any way affected by this decision.

On the argument the learned counsel for *Keenan* suggested that in the event of my opinion being in favor of the contestant, an application might be made to pay off the amount due on his mortgage out of the purchase money in Court, and that then, any claim he

1871. has be at an end, and none of the other petitioners having appeared to oppose the granting of the conveyance, it might be issued. The contestant's counsel acceded to this: indeed, his client only claiming as a mortgagee, upon the debt due him being paid, he has no further interest in the land one way or the other. It is impossible, however, for the Court to grant a conveyance, when the title which a claimant sets up is shewn to be bad; the absence of any opposition can never be a reason for granting a certificate of indefeasable title.

Re Keenan.

The contestant should have his costs, which I fix at $10, out of the estate.

RE BRILLINGER.

Lunacy—Jurisdiction—Administration.

The control of the Court ceases with the death of the lunatic, and an order for the distribution of a lunatic's estate will not be made under proceedings in lunacy

Under such circumstances the committee of a lunatic took under authority of the Court proceedings for the administration of the estate of a deceased lunatic, by applying for an administration order, which was granted; the proceedings being directed to be as inexpensive as possible.

[May, 1871.]

This was an application by Mr. *Gormley*, the committee of the estate of *Samuel Brillinger*, a lunatic, for the administration of the estate of his deceased sister *Mary Brillinger*, who had also been declared a lunatic by the Court.

Several years previous a suit had been instituted for the administration and partition of the estate of *Samuel Brillinger*, an intestate. During the pendency of that suit, two of the heirs-at-law and next of kin,

1871.

Re Brillinger.

Samuel and *Mary Brillinger*, were found to be of unsound mind. Proceedings were therefore taken to have them declared lunatics, and by an order of Court they were so declared, and a committee of their persons and estates was appointed. The only property to which they were entitled was the property in question in the administration and partition suit, and that having been converted into cash, their shares had been invested under the direction of the Court, for their benefit, partly on mortgage and partly in Dominion stock.

Mary had since died, and her brother *George Brillinger* had obtained letters of administration to her estate from the proper Court. The application now made was by the committee of *Samuel* on his behalf, for an order for the administration of *Mary's* estate.

Mr. *J. Hoskin*, for the applicant.

Mr. *A. Hoskin*, for the administrator, did not oppose the granting of the order asked.

Judgment.

MR. TAYLOR, REFEREE IN CHAMBERS.—When the committee applied for an order authorizing the institution of the present proceedings, I had some doubt as to the propriety of the course proposed to be adopted, thinking that the object in view might be accomplished by an order in the matter of the lunacy. As the point was a doubtful one, I gave the committee leave to take such proceedings as he might be advised for the administration and distribution of the estate. The present application is made in pursuance of that order.

On a careful consideration of the matter, I am satisfied that no order can be made in the matter of the lunacy, for the administration and distribution of the estate.

1871.

Re Brillinger.

The jurisdiction possessed by this Court in matters of lunacy, is the same as that which in England is conferred upon the Lord Chancellor, by a commission from the Crown under the sign manual. *(a)* There it has been held, that on the death of the lunatic the jurisdiction in the lunacy is gone. *(b)* It is true the jurisdiction continues to a certain extent, from the necessity of the case. Thus the control which the Court has over the committee of a lunatic does not determine by the lunatic's death, but the committee continues liable to account, and to all the consequences of misconduct on his part, and bound to act in delivering possession of the estate, as the Court shall direct. *(c)* So a receiver of the lunatic's estate may be ordered to continue acting until the arrears of rents and profits due at the time of the lunatic's death are paid and satisfied *(d)*; and when the title of the heir is uncontested, the Court may make an order to give possession to him. An order or report may also be made, after the lunatic's death, upon a proceeding originating prior to it, where such order or report is for the purpose of winding up the lunacy, *(e)* or for enforcing obedience to orders made during the lunatic's life time. *(f)* When the distribution of the estate is sought, independent proceedings must be taken for the purpose.

Judgment.

In *Wigg* v. *Tiler (g)* the lunatic having died, leaving money invested in Bank annuities in the name of the Accountant-General, Lord Chancellor *Bathurst*, on an application to have the money divided, ordered the Master to enquire who were the heirs-at-law and next of kin of the lunatic. The Master having made his

(*a*) Con. Stat. U. C., ch. 12, sec. 31.
(*b*) Ex parte Clarke, Jac. 592; Re Barry, 1 Moll. 414.
(*c*) Re Fitzgerald, 2 Sch & Lef. 440.
(*d*) Ex parte Clarke, Jac. 589.
(*e*) Ex parte Armstrong, 3 B. C. C. 237; Re McDougal, 12 Ves. 384.
(*f*) Ex parte Roberts, 3 Atk. 808.
(*g*) 2 Dick. 552.

report, the heirs-at-law and next of kin applied to Lord Chancellor *Thurlow* to have the funds transferred, but his Lordship was of opinion that a bill should be filed for the purpose of taking an account of the debts, and administering the effects. The plaintiff accordingly filed a bill for that purpose, and on the cause coming on to be heard, the Chancellor considered that the report on lunacy as to the heirs-at-law and next of kin, was not a sufficient authority on which to ground a decree, and directed a reference to the Master to make the same enquiries in the cause. In *Re Barry, (a)* Lord *Manners* made an order of reference after the lunatic was dead, to enquire and report who were the heirs-at-law and next of kin. After the report was made the matter came on before Lord Chancellor *Hart*, who said: "The Chancellor's authority under the sign manual is only during the life of the lunatic, and is at an end when the lunatic dies. By the death of the subject of the commission of lunacy the person having the authority is *functus officio*. This order of reference therefore is wrong, and I can now make no order in lunacy touching the property of the deceased lunatic; for I can only deal with the property while it is his, and it has ceased to be his, and my jurisdiction has also ceased. This was much discussed in *Beer* v. *Ward (b)* and in *Cotton's* Lunacy. There a similar reference was made in the matter, to enquire and report who was next of kin to the dead lunatic. I was counsel in it, and I contended that the Lord Chancellor had no authority to make orders in lunacy when the person was dead. Lord *Eldon*, however, made an order which led to two trials at law, and much litigation, which was fruitless; and Lord *Eldon* said he had done wrong, and that he ought not to have made any order in lunacy after the death of the lunatic; and finally it was necessary to file a bill." In the same case his Lordship said: "I can

1871.

Re Brillinger.

Judgment.

(a) Re Barry, 1 Moll. 414. (b) Jac. 194.

1871. make the committee of the fortune account; that is within my jurisdiction, from the necessity of the case. I cannot dispose of rights; but it is incidental to the authority to call upon the committee to wind up his account, and to hold the assets in safety. Besides, the next of kin have not primarily any right that can be recognized. They must work out their title through the Prerogative Court in the regular way."

Re Brillinger.

The only case which conflicts with this is the old case of *Ex parte Grimstone. (a)* There an order made on the petition of the next of kin to have the lunatic's personal estate, and for a declaration that two sums of money, savings of the estate, which had been applied during the lunatic's life-time to pay off his mortgages, were to be considered as part of the personal estate, and the trustee to whom the terms had been assigned declared a trustee for the next of kin, to the extent of these sums and for an account, was brought on for re-hearing before Lord Chancellor *Apsley* and two Common Law Judges. It being argued, that the authority arises from the King's sign manual, and ends with the death of the lunatic, the Lord Chancellor held that the Court had jurisdiction to make the order, citing *Ex parte Roberts (b)*, as sufficient to shew that the Court has exercised jurisdiction after the death of the lunatic. *Ex parte Roberts* was however, not a case in point. In that case the Master having approved of a conveyance of an estate pursuant to an order of reference made by the Chancellor, the lunatic died before the order was carried into execution, and the Court, after the lunatic's death, compelled the execution of the conveyance by attachment. This was an order clearly within the jurisdiction of the Court as laid down in *Re Armstrong* and other cases already referred to.

Judgment.

If the state of the deceased lunatic here was in the

(a) Ambl. 706. (b) 3 Atk. 308.

hands of the committee I could make an order for him to pass his final account, and hand over the personal estate to her administrator, and I could order any money in Court to be paid over to the administrator, whose duty it would then be to apply it in a due course of administration. *(a)* The difficulty here is that there is no estate in the hands of the committee, the principal part of the money is invested on one mortgage for the joint benefit of both lunatics, and the next of kin desire to have this mortgage converted into cash, and their share paid them at once. There is also a debt claimed as due from the lunatic's estate by the Provincial Lunatic Asylum, the amount of which is disputed, so an account of this sum must be taken.

1871.

Re Brillinger.

The order for administration may therefore go; but as the estate is small the reference should be conducted as inexpensively as possible. All the evidence necessary as to the next of kin can be supplied from the proceedings in the former administration and partition suit. As the evidence in the lunacy shewed clearly that the woman was of unsound mind from her infancy, there can be no debts due from her personally; and it is sworn that the only debt due from her estate is that claimed by the Asylum; the Master should therefore receive the administrator's affidavit as to debts as sufficient. The late Chancellor *Van Koughnet* gave a similar direction in *O'Brien* v. *O'Brien* (9th June, 1868), an administration and partition suit, in which the estate was very small.

Judgment.

If the mortgage is sold in order that the next of kin may at once receive their shares, they must bear any discount or loss occasioned by the sale; no part of that can be charged against *Samuel Brillinger's* share.

(a) Shelford on Lun. 212.

1871.

GANSON v. FINCH.

Security for costs.

An order directing security for costs to be given should name the sum for which the bond for security is to be given.

An application for an order for security for costs may be made after the expiry of the time for answering.

The fact that the defendant's solicitor knew that the plaintiffs had lands in the Province when he took out the order for security for costs was held a good ground of objection to the order.

An objection that the copy-order served was not endorsed with the name and place of business of the solicitor serving it was overruled, it not being shewn to have been the first proceeding taken by him.

On the plaintiff's shewing he had lands in the Province worth $4000, an order for security for costs obtained *on præcipe* was set aside, and the order being also irregular in form, it was set aside with costs.

[April 29, 1871.]

This was a motion to set aside an order for security for costs issued by the Deputy Registrar at London on the 17th of April, on the following grounds:—

Statement. 1. Because the said order should have specified a penal sum in which the plaintiff and his surety or sureties should give security, as required by the General Orders of this Court.

2. Because the time for answering for the said defendant *Joshua Doty* had expired before the issuing of the said order.

3. Because the solicitors for the said defendants, *Joshua Doty* and *Adam Oliver*, had asked for and obtained an extension of time to answer the bill of complaint in this case, and had waived their right to such an order.

1871.

Ganson v. Finch.

4. Because the said order was applied for and granted on *præcipe*, whereas, if entitled to such an order, it could only be granted on motion, and no notice was given to the plaintiff of the application for such order.

5. Because at the time of obtaining such order the defendants were aware that the plaintiff was seised in fee and was the owner of property, situate in Ontario, ample to meet all claims for costs, and the said defendants should not have applied for such order.

6. Because the copy of the said order served on the plaintiff's solicitor was not endorsed as required by the General Orders of this Court, in not giving the name or firm and place of business of the defendants' solicitor serving such order.

7. And because the said plaintiff is seised in fee and owner of property, situate in the City of London, in the Province of Ontario, ample to meet all claims for costs that may be made in this suit.

Judgment.

Mr. *Cassels*, for the plaintiff, cited *Nolan* v. *French*, 10 Ir. Eq. 612; *Morg.* and *Dav.* on Costs, 14; *Morg.* Stats., 427; and Consolidated General Orders 87, 105, 321, and 409.

Mr. *Foster*, for the defendants, besides arguing in favour of the regularity of the order, contended that the plaintiff had treated it as a nullity by noting the bill *pro con.* against *Doty*, and had therefore precluded himself from now moving against it.

MR. TAYLOR, REFEREE IN CHAMBERS.—The order for security for costs obtained by the defendants *Doty* and *Oliver*, is objected to by the plaintiff on seven grounds, six of these being objections to the regularity of the order. The order was granted by the Deputy

1871. Genson v. Finch.

Registrar at London, on the 17th of April, and was served on the plaintiff's solicitor the same day.

The first objection taken to the order is, that by its terms it requires the plaintiff to give "the defendants the usual security for costs in this cause, in accordance with the rules and practice of this Honorable Court," and does not name the penal sum to be inserted in the bond. The English Order passed in 1828 (*a*), relating to security for costs, fixes the sum for which security is to be given at £100; but that Order is not in force here, as the Order (*b*) of our Court provides for the penal sum to be inserted in the bond being fixed upon the application for security by the Judge or Master who makes the order. The sum for which security is given is usually $400, but is not always so. On petitions and some ordinary proceedings, it has been fixed at various sums; and in *Ryckman* v. *The Canada Life Assurance Co.* (*c*), it was, under the special circumstances, fixed at $200. As the General Orders of Court do not fix the sum for which security is to be given, it is evidently proper and important that the order made in each particular case should do so, In ninety-nine cases out of a hundred, the order for security is obtained *ex parte*, and unless the sum is specified in it, the plaintiff, when served with the order, can have no knowledge of what sum has been fixed, and for which the bond must be given. The form of order used in Toronto, for the last seventeen years at least, orders the plaintiff to procure some sufficient person or persons, residing within the jurisdiction of the Court, to give security on his behalf, in the penal sum of not less than $400."

Judgment.

It was said that orders have been made in Toronto, in the same form as the one here complained of, but I

(*a*) Eng. Con. Orders 40, sec. 6. (*b*) Con. Gen. Orders 821.
(*c*) Cham. 1, April, 1870.

have never seen any; and the Clerk of Records and Writs, who has had many years experience in such matters, informs me, that none have ever been so issued. Even in England, though the amount of the security is fixed by a General Order, yet the sum for which security is to be given, appears to be expressed in the order in each case (*a*).

The second objection is, that the time allowed for the defendant, *Doty* answering had expired; and the fourth which it is convenient to consider with this, is, that under the circumstances notice of the application for the order should have been given.

From the affidavit of service on the defendant, *Doty*, it appears that his time for answering expired on Saturday, the 15th of April, and the order was served on Monday, the 17th. I find no case in this country, nor in England, which decides that a defendant must apply for security before his time for answering expires.

Judgment.

The wording of our General Order, 406, might seem to imply this, because it says, that the day on which an order for security is served, and the time thenceforward until and including the day on which such security is given, is not to be reckoned in the computation of time allowed a defendant to answer or demur; and this of course would scarcely be applicable after the time for answering has actually expired. The English Order is worded in the same way, yet it would appear from a note in *Smith's* Pr. (*b*), that nothing in the English Orders prevents a defendant, after availing himself of the time to answer, from obtaining an order for security. In *Morg & Dav.* 14, it is said, that "In Ireland a defendant loses his right to security, if the time for answering has expired, though no step has

(*a*) Smith's Pr. 2nd ed. 558; Drew. Pr. 33; Seton 1269.
(*b*) 2nd ed. 558.

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been taken in the cause, but this does not appear to be the practice in England." Two Irish cases are cited as authorities for the proposition that the right is lost in Ireland by delaying till after the expiry of the time for answering. I do not think either of the cases necessarily establishes that. In *Nolan* v. *French* (*a*) the bill was served on the 21st September, 1846, on the 10th of January, 1847, the plaintiff served a notice of motion to take the bill *pro confesso* against the defendant, and on the 20th the defendant served notice of motion for security for costs; on the objection being taken that the motion was too late, being made after service of the notice to take the bill *pro confesso*, the motion was refused. It is true the Master of the Rolls, Sir *T. C. Smith*, in giving judgment, said: "It has, I believe, been decided by the late Master of the Rolls, that the motion must be made before the time for answering has expired; and if that decision was right, the present motion is too late, even though no step had been taken in the cause by service of the notice to take the bill as confessed." The language of the learned Judge must be noticed, "if that decision was right," he does not say he approves of it, and it was for the purposes of the motion before him, unnecessary to consider the point. The case referred to as decided by the late Master of the Rolls, is *Robinson* v. *Bradley*, reported in the *Law Recorder*, a series of reports which I have been unable to see. From the argument of counsel in *Eyre* v. *Dwyer* (*a*) it appears, however, to have been exactly the same as *Nolan* v. *French*, and decided on the same ground; not because the time for answering had expired. In *Eyre* v. *Dwyer*, (which is the second case cited in *Morg. & Dav.*), the defendant moved for security after service of the month's notice to press for an answer; the plaintiff's counsel contended, on the authority of *Robinson* v. *Bradley*, that the motion was too late after service

Judgment.

(*a*) 10 Ir. Eq. 211. (*b*) Sau. & Sc. 653.

of such a notice, and Sir *Michael O'Loghlen*, Master of the Rolls, said he would adhere to the rule laid down by Sir *William McMahon*, and refuse the motion with costs. *Foster* v. *Eyres* (*a*) turned upon a similar point. It is true that in *Long* v. *Long* the Master of the Rolls said that the late Master of the Rolls held in a case not reported, that the notice of motion must be served before the time for answering had expired. The ground of that practice, however, was said to be that the defendant having expressly disobeyed the subpœna, was in contempt, and could not, therefore, apply to the Court. It is difficult to see how this could be as a party is not in contempt until process of contempt has actually been sealed. Here, too, a defendant cannot be said to be in contempt for not answering, especially when no process of contempt can be issued against him in such a case.

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The case of *Atkins* v. *Cooke* (*b*) would seem to favour the view taken by the defendant, for there it was held that a respondent to a petition entitled to security, need not make an independent motion for security, but may wait until the petition comes on. In the absence of any authority I do not think I should hold that the application cannot be made after the expiry of the time for answering. I cannot see that the fact of the plaintiff having a right in England to enter an appearance for the defendant, should make any difference.

Judgment.

As to notice of the application not being given, it was said that there is no evidence that notice was not given, and that it could not be assumed that the order was made *ex parte*. The form of the order shews that it was made *ex parte*. It is said to be, "upon the application of the defendants *Joshua Doty* and *Adam Oliver*, on *præcipe* filed, and upon reading

(*a*) 7 Ir. Eq. 688. (*b*) 8 Drew. 694.

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the plaintiffs bill of complaint." If notice had been served it would not have been "upon *præcipe*," and if the plaintiff had attended that would have appeared upon the face of the order; if he did not, it would have been "no one appearing for the plaintiff, although notified;" but I do not think I should hold that notice of the application was necessary. To do so, would render it necessary, in every case where there are several defendants, for a defendant, before applying for security, to make a search to ascertain if the bill had been noted *pro confesso* against any of his co-defendants, and put him to the expense of a special application if he proved it to be so. That the bond when given, is to include all the defendants, is no objection, for the condition is only to pay such costs as the Court shall think fit to award to any of the defendants. Now where the bill is taken *pro confesso* against a defendant, if he does not appear in any way he can have no costs, if he does, and the Court at the hearing thinks proper to give him costs, there seems no reason why he should not have the benefit of the bond as well as his co-defendants. The plaintiff is liable for only one penalty among all the defendants: *Loundes* v. *Robertson* (*a*).

Judgment.

The third objection is, that time had been asked for answering, and thereby the right to security waived. This is asserted on the one side, and denied on the other. An offer of settlement seems to have been made from the defendant's solicitor, which the plaintiff's solicitor says, he at once told him he knew would not be accepted, but that he would submit it to the plaintiff. According to the plaintiff's solicitor nothing was said about staying proceedings until an answer came from the plaintiff; but the defendant's solicitor seems to have understood that matters would not be pressed in the

(*a*) 4 Madd. 465.

meantime, for on the 14th of April he wrote the plaintiff's solicitor that not having received a reply to the offer of compromise, and the time for answering being nearly up, he presumed no advantage would be taken if *Oliver's* answer was not in at the proper time; adding that he understood nothing would be done until the plaintiff's reply was received. To this the plaintiff's solicitor replied the same day, stating that the plaintiff's reply had been received, declining the offer made, repudiating any arrangement to stay proceedings having been made, but offering time to answer, if the defendant would consent to a change of venue to Hamilton, and take six days' notice of hearing. This letter the defendant's solicitor received on Saturday, the 15th of April, and made no reply, but on the morning of Monday, the 17th, took out and served the order for security. I do not think I can hold that there was here such an asking for further time to answer as would waive the right to security. It may be observed, too, that although the expression is used in the books of practice, "applying for time," the cases cited are all cases where an application for further time was made and granted. I have have seen no case in which merely asking time from the opposite solicitor, which was refused, or granted only upon certain conditions, and which, as in the present case, the defendant could not and did not accept, was held a waiver. It is true there is no case to the contrary either, but there is room for argument that it would not.

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Judgment.

The fifth objection is, that the defendants knew before taking out the order that the plaintiff had property within the jurisdiction. Here again the solicitors contradict one another, but I think it must be held that the defendant's solicitor knew this fact. The plaintiff's solicitor, after proving that the plaintiff is the owner of property, and speaking of the interview

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at which the proposal of compromise was made, says, "the said *G. J. B.* asked me if the plaintiff was not possessed of property in this country, I told him that I knew the plaintiff to be the owner of the above mentioned property in London, and Mr. *B.* replied that he had understood that *Ganson* was the owner of property here." The contradiction is peculiar, and is worded thus: "I am not acquainted with the said plaintiff, nor have I any means of knowing whether he owns any real estate in the Province of Ontario, and I deny ever having stated to the said *B.* that I believed that the plaintiff did ever own such real estate." He does not deny having asked the plaintiff's solicitor as to whether the plaintiff owned property, or that the plaintiff's solicitor told him that he did own this property in London. He denies saying that "he believed the plaintiff owned such real estate." The plaintiff's solicitor never said he so stated; he simply swore to the defendant's solicitor saying he understood the plaintiff owned property here.

Judgment.

The sixth objection, that the copy-order served is the first proceeding on the part of the defendants, and is not endorsed in accordance with the General Orders, cannot be given effect to. It is not proved to be the first proceeding, and I should not, where such an objection is taken, assume this without proof. The argument that it must be, or the defendant's right to security is waived, does not hold good. The defendants might appear and file and serve affidavits on many proceedings, such as a motion for injunction, or receiver, or to pay money into Court, without waiving their right to security (*a*).

The seventh objection to the order is, that the defendants are not entitled to security because the

(*a*) Murrow v. Wilson, 12 Beav. 497; *ex parte* Seidler, 12 Sim. 106.

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plaintiff owns real estate within the jurisdiction, of sufficient amount. It is proved that he owns property in the city of London unincumbered, worth over $4000. This is sufficient to deprive the defendants of their right to the order (*a*). The affidavit proving this was objected to because made by the solicitor, and not by the plaintiff himself. It is quite true that the Courts discourage the practice of solicitors swearing on behalf of their clients to matters which should come more properly from the party himself. The affidavit here however, is made by the solicitor, not in that character, but as the agent of the plaintiff, acting in the management of this property under power of attorney. The affidavit of an agent was held sufficient in *McEwan* v. *Boulton* (*b*). The deponent's knowledge of the plaintiff's title being good and unincumbered, is derived from the fact that he has quite recently obtained for him a certificate of title under the Act for Quieting Titles to Real Estate.

Judgment.

The plaintiff is not precluded from moving against the order by having noted the bill *pro confesso* against *Doty*. The order granted by the Deputy Registrar does not stay proceedings, and the General Order is, that the time after an order for security is served is not to be reckoned in the time allowed the defendant for answering. Here the time for *Doty* answering had expired before the order was obtained, so the noting against him seems regular. The time for the other defendant, *Oliver*, answering had not expired.

The order for security must be set aside, and as I hold it to be irregular, it must be set aside with costs.

(*a*) White v. White, 1 Cham. R. 48; Gault v. Spencer, 2 Cham. R. 92.
(*b*) 2 Cham. R. 339.

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McMURRAY v. GRAND TRUNK RAILWAY COMPANY.

Amending.

Where an order giving leave to amend, has been granted without limiting the time in which the amendments are to be made, such amendments should be made within fourteen days from the date of the granting of the order; where circumstances prevented this being done, and no order dismissing the bill in the alternative of it not being done, was embodied in the order granting the leave to amend, the Referee *held* it to be competent to the Court to grant further time for amending, even on an application made after the fourteen days have expired, if a proper case was made out for it.

[May, 1871.]

This cause came on for hearing at Toronto, and the cause then stood over for want of parties. The order made thereon was made on the 1st of April, and was the usual order, giving the plaintiff liberty to amend his bill of complaint. No time was limited for making the amendment.

Statement.

On the 5th of May following, a notice of motion was given to extend the time for amending under the above order. In support of the application an affidavit of the plaintiff's solicitor was read, alleging that considerable time had been consumed in settling the minutes of the order, owing to disagreement between the solicitors; also that the Registrar ruled that under this decree the time was governed by General Orders 324 and 325.

In answer it was alleged that although judgment was given on the 1st of April, no notice was served of settling the order until the 13th of April, although on the 4th or 5th of April the plaintiff's solicitor was informed by defendants' solicitor that the time was running. It was also alleged that V. C. *Mowat* was in town until the 6th of April, and could have been referred to, that no such ruling as stated was made by the Registrar in presence of defendants' solicitor, that

there was no entry of any such ruling in the Registrar's book, and that the order was entered on the 20th of April, and only issued on the 24th.

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Mr. *Rae*, for the plaintiff, contended that under the circumstances the plaintiff was entitled to the relief asked. No injury could accrue to the defendants, and that he had been misled by the Registrar's ruling.

Mr. *Cassels*, for the defendants, contended that the bill of complaint was out of Court and the motion could not be made. He cited Order 83; *Brathwaite's* Practice, 304; *Ayckbourn's* Prac. 36; *Seton* on Decrees, 1116; *Tampier* v. *Ingle*, 1 New Reports 159, to shew that the time ran from the date of the order. That the bill was gone, the amendments not being made within the time: *Watkins* v. *Bush* (*a*); *Armitstead* v. *Durham* (*b*); *Matthews* v. *Chichester* (*c*); and *Hoflick* v. *Reynolds* (*d*). *Tampier* v. *Ingle* (*e*), Mr. *Cassels* contended did not decide the point, as no objection to the amendment was raised and it could hardly be held to overrule *Hoflick* v. *Reynolds*, in which case the same Judge, after mature deliberation, had laid down the law.

Argument

That even if time ran from the entering, the fourteen days had expired before the motion was made.

The delay was not accounted for up to the 13th. The plaintiff's solicitor must have known two or three days would elapse in settling the order, and should not have put off settling the same until the day before the time expired. If the Registrar ruled as stated, his ruling was *ex parte*, and is entitled to no weight, especially in the face of a Court order to the contrary. There being

(*a*) 2 Dick 701.
(*b*) 11 Beav. 428.
(*c*) 11 Jur. 49.
(*d*) 9 W. R. 398.

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no entry in his book there is no evidence of any such ruling, if any there was. The following cases were cited to shew that in England time would not be given, and the Court would not consider the question as to what damage would be occasioned to the plaintiff:—*Charlton* v. *Richmond* (*a*); *Knight* v. *Majoribanks* (*b*); *Armitstead* v. *Durham* (*c*); *Matthews* v. *Chichester* (*d*); *Clarke* v. *Mayor of Derby* (*e*).

Mr. *Rae* replied, contending that the order was not out of Court; that even if it was necessary for him to have amended within the fourteen days, that it was quite competent for the Court to extend the time, if he made out a case which would justify such an extension, that it was a fair consideration the balance of the convenience or the injury that would ensue to either party, as the result of the refusal, or of the granting of the application.

Judgment.

MR. TAYLOR, REFEREE IN CHAMBERS.—The order made upon the hearing in this suit ordered the cause to stand over, with liberty to the plaintiff, on payment of certain costs, to amend by adding parties. Judgment was given on the afternoon of Saturday the 1st of April, but the amount of costs was not fixed by the Vice Chancellor until the morning of the 3rd. On the 12th of April notice of settling the minutes was given for the 13th, but owing to disagreement between the solicitors as to the terms of the order, the minutes were sent by the Registrar to the Vice Chancellor, then absent on circuit, by whom they were received on the 18th. The order was entered on the 20th, and issued on the 24th, being dated 1st of April.

(*a*) 4 Beav. 397. (*b*) 14 Sim. 198. (*c*) 11 Beav. 430.
(*d*) 11 Jur. 49 (*e*) 10 Jur. 978.

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On the plaintiff's solicitor attending at the office of the Clerk of Records and Writs for the purpose of amending, that officer objected that the time had elapsed, and refused to allow any amendment of the record to be made.

The plaintiff moved for an order "allowing the plaintiff to amend his bill of complaint herein, and extending the time to amend herein under the order, for such time, and on such terms as may be thought just."

For the defendants it is argued that an order made at the hearing, giving liberty to amend, is like ordinary orders to amend governed by the provisions of General Order 83, which is in these words, "A plaintiff having obtained an order to amend his bill, is to amend within fourteen days from the date of the order; otherwise the order to amend becomes void, and the case as to dismissal stands in the same situation as if the order had not been made."

Judgment.

It is further contended that the bill not having been amended within the time limited, it is out of Court, so that no order can now be made, and a number of cases are cited in support of this position.

There is no doubt that such an order as the present comes within the terms of General Order 83, and that the amendment under it should have been made within fourteen days from the date. The question then comes, can the time be extended, and if so, should it be so in the present case?

Notwithstanding the cases cited to shew that the suit is out of Court, I cannot agree that it is so out of Court, as that no order can be made. It may be said to be out of Court to this extent, that the plaintiff cannot take any step in the cause, unless he obtains an extension of the time for amending, and makes the necessary

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amendment. If the defendant desired now to tax his costs of this suit, the taxing officer would have no authority to tax them on the mere production of the order, and a certificate of no amendment having been made, so if a certificate of *lis pendens* were registered in a county registry office, the registration of this order would not have the effect of getting rid of that *lis pendens*. In either case it would be necessary to apply for an order dismissing the bill. This order could not be obtained *ex parte*. The present order does not say that the bill if not amended is to be dismissed, so the case would not come within *Dobede* v. *Edwards* (*a*) or *Burns* v. *Chisholm* (*b*).

The necessity for a further order for the purpose of getting the bill dismissed, shews that the suit is not so far gone that the Court has no jurisdiction to make an order. That the bill is not so completely out of Court, and that some further order is necessary appears from *Tampier* v. *Ingle* (*c*). There an objection having been taken for want of parties, the cause was ordered to stand over, with leave for the plaintiff to amend without any time within which the bill should be amended being mentioned. The plaintiff omitted to amend his bill or to take any other step. One of the defendants then moved to dismiss, and the motion stood over, the plaintiff in the meantime to take such steps as he might be advised. The plaintiff by summons in the ordinary way amended his bill, but on the motion to dismiss coming on for the costs he was ordered to pay these. The wording of General Order 83, which is, that if the amendments are not made within the term, the case is to stand as to dismissal in the same situation as if the order had not been made, seems further to favor this view.

Judgment.

That case further shews, that, even though the time has elapsed leave to make the amendments may be given.

(*a*) 11 Sim. 454. (*b*) 2 Cham R. 88. (*c*) 1 N. R. 159.

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That the time for amending may be extended there can be no doubt, The plaintiff here is in fact adopting the very course which the Master of the Rolls pointed out in *Bainbridgg* v. *Baddeley* (*a*) as the proper course. There an order having been made on demurrer allowing the demurrer, but giving the plaintiff leave to amend without limiting any time for making the amendment; the plaintiff did not amend under it, but after five months took out a common order to amend, and amended his bill; On a motion by the defendants to discharge this order as irregular, the Master of the Rolls reserved judgment saying, "The only question really is, whether the plaintiff should have obtained a special order, instead of an order of course." On a subsequent day he discharged the order, on the ground that the plaintiff should either have applied specially to extend the time, or for a special order to amend.

Judgment.

It does not seem necessary that an application to extend the time should be made before the expiring of the limited time. This has been held in the case of applications to extend the time for rehearing or appealing, and the same principle would seem to apply to an application to extend the time for amending. The plaintiff's solicitor further states in his affidavit, sworn on the 9th May, that he understood from the Registrar that it being impossible owing to the necessity of referring to the learned Vice Chancellor, to have the order issued within the fourteen days, he would have the same time after the decree issued. That the Registrar made any such statement is denied on the part of the defendant, but on referring to the Registrar he informs me that the statement in the affidavit of the plaintiff's solicitor is strictly correct. There is no doubt that the Registrar was in error as to this, and that the solicitor should not have allowed himself to be misled, the Order of Court being explicit; yet the

(*a*) 12 Beav. 152.

1871. circumstance that the Registrar did so state, and the plaintiff's solicitor was misled thereby, cannot, and should not, be overlooked.

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Besides, in the present case, the plaintiff was given liberty to amend only upon payment of certain costs, and the defendants have accepted these costs, which would seem to be a waiver of the right to object. In *Taretlon* v. *Dyer* (*a*) it was held that accepting the 20s. costs, under a second and irregular order to amend, is a waiver of the right to object to it as irregular. I think there is no doubt but the Court has jurisdiction to make an order extending the time.

The only question that remains is whether that jurisdiction should be extended in the present case. No explanation is offered of why the order was not taken out at once, but the notice of settling the minutes was served in sufficient time to have enabled the plaintiff to take out his order, and amend the bill within the fourteen days, had it not become necessary to refer to the learned Judge, who was then absent from Toronto. The cause stood over at the last sittings, and could not be brought to a hearing until the next autumn sittings. To allow the amendment to be made now will not cause any delay, and cannot in any way prejudice or injure the defendants, while after the great expenses which have already been incurred, to refuse leave to amend would be a great hardship upon the plaintiff.

Judgment.

I therefore allow the plaintiff, upon payment of 25s. costs of this application, to make the amendment necessary under the order of 1st April, making such amendment within seven days from this date.

(*a*) 1 R. & M. 66.

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BRIGHAM V. SMITH.

Staying proceedings pending an appeal—Interlocutory order—Pleading Statute of Limitations.

A motion to stay proceedings pending an appeal, may properly be made, although no petition of appeal has yet been filed.

But the party applying for a stay must be in a position to appeal. When, therefore, a party seeking a stay, pending an appeal from an interlocutory order, applied; when it had became too late to give notice and get in his appeal within six months, the application was refused.

An order of Court dismissing an appeal from the Master, was held to be an interlocutory order, and it was held that an appeal against the same should have been brought within six months.

The Court will not relieve a party against the effect of one lapse of time in order to enable him to set up another lapse of time against creditors; where, therefore, a party applied for leave to appeal after the time for appealing, [or for giving notice thereof] had expired, in order to enable him to set up the Statute of Limitations against certain creditor's claims, the Court refused the application.

[June, 1871.]

Statement.

On the 8th of March, 1871, at the close of the argument of counsel *Mowat*, V. C., dismissed the plaintiff's appeal from the Master's report (dated 30th June, 1870,) on the claim of *Donald McPherson* and *Walter Wendle*, creditors of *Brigham* and *Smith* (partners in business), on the ground, amongst other things, that the Statute of Limitations, which the plaintiff set up for the first time on the appeal, was not then open to the plaintiff; that, as the creditors had a right to meet that defence to their claim, by giving evidence of an acknowledgment in writing, or a payment within the stated period, notice of the defence, if not set up in answer to the petition in the first instance, must be given before the time for closing the evidence in the Master's office had arrived.

Afterwards, viz., on the 16th May, 1871, the plaintiff moved before the same learned Judge for a reference

1871. back to the Master, in order that the plaintiff might set up that defence, which he had not set up before to the claims. This application was also refused.

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Afterwards, viz., on the 29th May, the plaintiff moved before the Referee in Chambers for an order to stop the payment of the debts in question out of the money in Court, pending the appeal from the two orders mentioned; and the Referee refused the motion on the ground, that these orders being interlocutory, the appeal could not be brought on within six months from the making of the orders, as it was necessary it should be; stating his view in the following terms:—

MR. TAYLOR, REFEREE IN CHAMBERS.—That no petition of appeal has yet been filed does not seem to prevent the plaintiff moving for a stay of proceedings. In *The Mayor of Gloucester* v. *Wood* (*a*) Vice Chancellor *Wigram* having dismissed the bill and orderd a large sum of money paid into Court, early in the suit, to be paid out, an application was made for a stay of proceedings and entertained by the Vice Chancellor. That application was supported by an affidavit from the plaintiff's solicitor stating that the plaintiffs had been advised by counsel to appeal from the decree, and had instructed the deponent to take the necessary proceedings for that purpose and that it was intended to institute such appeal as soon as the rules and practice of the Court would permit, and to prosecute the same without any unnecessary delay. It seems, however, a fatal bar to the plaintiff obtaining the relief he seeks that he is not entitled to appeal here. The order intended to be appealed from is one dismissing an appeal from a Master's report, and is, I think, certainly an interlocutory order within the meaning of section 55 of chapter 13 of the Consolidated Statutes

Judgment.

(*a*) 3 Hare 150.

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of U. C., so the appeal must be brought to a hearing within six months. This order is dated 8th March, and was entered on the 13th of that month, so the plaintiff should have taken the necessary proceedings to bring on the appeal at the June sittings of the Court of Error and Appeal. No step has as yet been taken for that purpose, and he is now too late to serve the petition of appeal two months before the time for hearing the appeal as required by section 52. That he intends appealing also against an order made a few days ago does not assist him. To accomplish his object the order of 8th March must also be appealed against, and the time is not extended by the appeal being against a subsequent order also, *McFarlane* v. *Dickson*. (*b*).

I do not see how I can make an order to stay proceedings pending an appeal which is not in the present position of the suit open to the plaintiff, and which, for anything that appears at present, he may never obtain leave to bring.

Judgment.

On the 5th June, the plaintiff, acquiescing in the Referee's construction of the Statute, moved before *Mowat*, V. C., in Chambers, for leave to appeal, and for a stop order meantime.

Mr. *Fitzgerald*, for the appeal, contended that the order was a decretal order, *i. e.*, an order in the nature of a decree, and that he had a year during which he could appeal. He referred to section 55 of the Error and Appeal Act; *Taylor's* Orders, 53.

Mr. *S. H. Blake*, contra.—If the the order is not an interlocutory order, there is still time to appeal from it, and the present application is unnecessary; if it is admitted to be an interlocutory order, Mr. *Taylor's* decision

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(*a*) 1 Cham. R. 377.

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is correct; and if not, it was open to the other side to appeal from it. As to the merits, nothing has been shewn why the appeal could not have been ready for the June sittings; they were bound to shew some "special grounds" (*a*); only in that case had the Court jurisdiction to extend the time. *Bank of Upper Canada* v. *Wallace* (*b*); *Leeson* v. *McAlpine* (*c*); *Gilbert* v. *Jarvis* (*d*). The proposed defence is the Statute of Limitations, and yet the plaintiffs ask to be released from the limitation in the orders as to appealing, but the Court will not assist a party to set up a technical defence—a party must make "a special case," and that in aid of a meritorious defence. The defence of the Statute of Limitations could have been raised at any time during the past two years. Even if liberty to appeal were given, no ground is shewn for granting a stop order. Under certain circumstances an order to stay proceedings is granted, but that is only done on giving security; here, there should be security; but after all the delay that had taken place an order to stay even on security, would be unreasonable.

Judgment.

Mr. *Fitzgerald*, in reply, referred to *Butler* v. *Church* (*e*), in which he contended the circumstances are not very special, yet that there leave to appeal was granted; here, however, the circumstances are special; the delay was only from March to May, when the application for reference back to the Master was made. —[THE VICE CHANCELLOR.—You made that motion at your own risk, and if you failed and lost time by the proceeding, can it be said you ought to have more time to appeal?]—We offer to go down at the coming sittings of the Court of Appeal, and the result of that will be, that the appeal will in fact be heard within six months, which will be

(*a*) Section 55 of Act. (*b*) 2 Cham. R. 169. (*c*) Not yet reported.
(*d*) 2 Cham. R. 259. (*e*) 3 Cham. R. 91

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regular, even if the order is an interlocutory order. Our difficulty is only that we are too late for giving the necessary notice, and for that require leave. *Davidson* v. *Boomer*, reported in this volume, was referred to. It must be considered too, that the Statute of Limitation was not the only defence set up.—[THE VICE CHANCELLOR.—Mr. *Blake* offers to let you in to appeal if you will abandon the defence of the Statute of Limitations, that seems an answer to your argument.]—Mr. *Fitzgerald*.—The Statute of Limitations is a healing statute, and allowed to be pleaded as such. There has been delay on the other side, and it does not lie with them to urge delay against the plaintiff. There can no injury accrue to any one by the money remaining in Court. *Lindsay Petroleum Company* v. *Hurd* (*a*) was mentioned. A *primâ facie* case of merits has been made out, and that is all that is necessary. Applications for leave to appeal should be favourably entertained.

Judgment.

MOWAT, V. C.—Counsel for the creditors offered to consent to this motion, if the plaintiff would waive any question as to the defence of the Statute of Limitations; but counsel for the plaintiff refused that offer. The object of the appeal being to set up the Statute, and for that purpose to get the Court of Error and Appeal either to consider the question of Chancery practice which I had decided, and to decide it differently; or to consider whether I had exercised a proper discretion in refusing the subsequent motion. I apprehend that neither alternative would be held open to the plaintiff in the Court of Error and Appeal; and I am of opinion that if either were open, the creditors have a just right to object to the plaintiff being relieved from the statutory effect of one lapse of time, in order to

(*a*) 3 Cham. R. 16

1871. enable him to set up another lapse of time against the creditors.

Brigham v. Smith.

The plaintiff then moved to discharge the Referee's order, and for a stop order pending the proposed appeal: Counsel for the creditors agreeing to argue the motion without notice being previously served. The question on this motion was, whether the order dismissing the appeal from the Master's report was a decretal order or an interlocutory order: twelve months being allowed by the Statute for bringing on an appeal from a decretal order, and only six months for an appeal from an interlocutory order.

MOWAT, V.C.—I am clear that the Referee was right in holding the order in question to be an interlocutory order. The application must therefore be refused with costs. If the costs of the various orders have not yet been fixed or taxed, let one sum be fixed or taxed for all.

Judgment.

DUFF v. BARRETT.

Leave to appeal after time for appealing expired.

To obtain leave to appeal after the time for appealing has elapsed, the party applying must shew "special circumstances."

Although the time for appealing counts from the date of the original decree, where a cause has been reheard, and the decree affirmed; yet, the fact, that a cause has been reheard, will be taken into consideration on an application for leave to appeal after the time has expired.

A party's poverty is not of itself a sufficient excuse for delay, although the Court will not exclude it from consideration, but it will receive such a plea with caution.

Mr. *T. Moss*, moved on the part of the plaintiff, to discharge an order made by the Referee refusing leave

to appeal from the decree pronounced on the hearing and rehearing of the cause.

1871.

Duff v. Barrett.

Mr. *Moss* contended that the circumstances established a sufficient special case to entitle the plaintiff to leave to appeal, although the time had in strictness elapsed. It was only necessary for him to shew a *primâ facie* case for appeal, and there were sufficient merits shewn for that purpose. The Judges who heard the cause had differed in their opinions as to what the decree should be, which of itself shews there were merits, in the view of one of them, on the plaintiff's side. He cited *Butler* v. *Church (a)*. No one would be prejudiced by the delay occasioned by the leave to appeal being now granted. He also urged that the plaintiff's want of means had obliged him to delay proceeding.

Mr. *Evans*, contra.

Argument.

The well established principle of all the decisions is, that "special circumstances" must be shewn to entitle a party to the indulgence asked here; poverty is no sufficient cause for delay. Indeed the affidavit does not shew, that the party is any better able to bear the expense of proceeding, than he was within the time in which he ought to have appealed. The plaintiff was bound to make out a strong case, this he had failed to do. *Bank U. C.* v. *Wallace* (*b*); *Macfarlane* v. *Dixon* (*c*); *Gilbert* v. *Jarvis* (*d*); *Bullen* v. *Renwick* (*e*), were cited. In *Leeson* v. *McAlpine*, heard before *Mowat*, V. C., and not yet reported, leave is said to have been granted, but in that case the time that had elapsed, was much less than in the present case. He also urged the injury that would accrue to the defendant if leave to appeal was granted.

(*a*) 3 Cham R. 91. (*b*) 2 Cham R. 169. (*c*) 2 Cham. R. 38.
(*d*) 2 Cham. R. 259. (*e*) 1 Cham. R. 204.

1871.

Duff v. Barrett.

Mr. *Moss* in reply. No one will be damaged by the delay occasioned by the appeal, and in such cases the Court will rather encourage an appeal than otherwise, that a satisfactory decision may be arrived at, and that, the more especially, where a difference of opinion has existed between the learned Judges who heard the cause.

MOWAT, V. C.—This was an application to discharge an order made in Chambers on the 27th January, 1871, refusing to the plaintiff leave to appeal from the decrees pronounced on the hearing and rehearing of this cause. The question is, whether the plaintiff has shewn "special grounds" sufficient to make this leave proper, notwithstanding the lapse of time.

Judgment.

The original decree was pronounced on the 24th February, 1869, a year and eleven months before the making of the application now in question. More than six months after the making of the decree, viz., on the 25th August, the plaintiff applied for leave to rehear notwithstanding the lapse of time. The application was granted; the cause was reheard; and the judgment on the rehearing was pronounced on the 18th February, 1870, more than eleven months before the application now under consideration.

In *McFarlane* v. *Dickson* (*a*) I held that, where the order on a rehearing affirmed the decree *simpliciter*, the time for appealing, as fixed by the statute, should be reckoned from the date of the original decree. The fact of the cause having been reheard, however, may be a circumstance to be taken into account in the exercise of the discretion of the Court on an application to extend the time; and if the time lost by the rehearing is thereby considered to be sufficiently

(*a*) 2 Chamb. R. 38.

accounted for, the party desiring to appeal can hardly expect more. Here the plaintiff has to justify nearly a year of delay; and the rehearing accounts for six months only. 1871. Duff v. Barrett.

The plaintiff's solicitor says in his affidavit that he was under the impression that a petition of appeal filed within a year was in time; but the petition was not in fact filed within the year, and it is not suggested that the erroneous impression of the solicitor caused any part of the delay which occurred. Indeed the contrary is clear.

The plaintiff's counsel further set up, as a sufficient special ground, what he called the plaintiff's poverty. Poverty has never been made, by the Legislature, an excuse to the operation of any of the Statutes of Limitation; and though the Court has thought proper not to exclude it from consideration on applications of this kind, yet caution has to be observed in regard to the importance which in any case should be attached to it. Does poverty, when made out, relieve a party altogether from the limit as to time which Parliament laid down? That is not to be supposed. What, then, is the limit within which this consideration is to be allowed to operate? If a party is not worth £5, over and above his wearing apparel and the matter in litigation, he may appeal *in formâ pauperis*. When his poverty is not so great as that, the Court should, on an application like this, have satisfactory information of the extent of the applicant's means. But I do not know what this plaintiff's means are. He speaks of a farm which he owns and has mortgaged, but does not say what its value is, or when he gave these mortgages, or what the amount of the mortgages is, or that he has no other property. In the absence of these statements, I cannot assume the fact of poverty as a sufficient excuse for delay, though the plaintiff

Judgment.

1871. undertakes to say that it was "impossible" for him "until the present time" to raise the necessary funds. That impossibility may have arisen from want of energy, or effort, or skill, or many other reasons besides poverty.

Duff v. Barrett.

Reference was made to the plaintiff's position as a surety in the transaction in question, and to the difference of opinion between the present Chancellor and myself on the re-hearing: his Lordship considered the decree right, while I thought it wrong. But such a difference of opinion does not explain delay in appealing; and the case made by the plaintiff's bill does not seem to me to present any special equity in the plaintiff's favor. The defendant *Barrett*, beyond question, advanced his money in good faith on, as well the security of the plaintiff's obligation for the debt, as the other security given to the defendant. The plaintiff's principal ground for relief is the technical ground that, according to the right construction of the instrument in question, the defendant thereby granted an extension of time to the principal. But the intention was, that the plaintiff's concurrence should be obtained. If the instrument, in connection with what afterwards took place, gave the extension (as I thought was the case), though the precaution of obtaining the plaintiff's concurrence had been overlooked after the agreement was entered into, or had come to be thought unnecessary, it was not suggested that the extension had inflicted any damage on the plaintiff, nor, therefore, does it create any moral equity in his favor.

Judgment.

The plaintiff's other ground for relief is, that the debt has been paid; but that is matter for the Master's office under the decree as it stands (*a*).

(*a*) See S. C., 17 Gr. at 189.

I think that the plaintiff has not shewn any sufficient special ground to have the leave he asks, after the lapse of time which has taken place, and that the motion should be refused with costs. 1871. Duff v. Barrett.

SCOTT V. BLACK.

Order for delivery of possession.

An application for an order for possession can not be made the means of trying the right to possession between a landlord and his tenant or a trespasser. Where, therefore, a mortgagor's tenant had attorned to the mortgagee, and afterwards such tenant left the premises, and they fell into the hands of another party, an order for possession against such party was refused.

[May, 1871.]

Mr. *Hamilton* moved for delivery of possession by *John Furlong*, under the circumstances appearing in the following judgment:—

MR. TAYLOR, REFEREE IN CHAMBERS.—It is impossible to entertain this application. To do so would simply be to entertain an ejectment suit by a landlord against a tenant of whom he wishes to get rid. Judgment.

The final order of foreclosure was obtained on the 16th of May, 1870: at that time the defendant *Black*, the mortgagor, was in possession of the land by *Patrick Furlong*, his tenant. On the 21st of May, the plaintiff agreed to allow *Black* to refuse or redeem the property before or up to autumn of the same year, if he would give up possession. The defendant, therefore, signed a paper agreeing to give up peaceable possession, and authorizing *Furlong*, his tenant, to treat the plaintiff as the owner of the land; and, on the same day, *Furlong* signed a memorandum on the same paper in these words: "I hereby acknowledge and accept of Alexander Scott, of the Township of Hallowell as my landlord, and will give him one-third of the proceeds of the above-named land for the present year." Immediately upon this

1871. Scott v. Black.

being signed, *Furlong* became *Scott's* tenant, and *Scott* had possession of the land by his tenant. Since then, it appears, *Patrick Furlong* has left the property, and one *John Furlong* is now in occupation. He is either a trespassor, or he is in as assignee of *Patrick*, the plaintiff's tenant. If he is a trespasser, no case can be made against him (*a*). If he is in as assignee of *Patrick*, his right to possession will depend on whether *Patrick's* term has expired or not, and whether he had a right to assign or sublet; but whether he is entitled to possession or not, is a question which cannot be tried in this suit. Even if the plaintiff had never accepted *Patrick* as his tenant, he could have no relief under Order, 464, *(b)*.

Judgment.

The *Bank of Montreal* v. *Wallace* (*c*) was an application by a purchaser at a sale under a decree, and the practice in such a case is quite different, and is governed by another order altogether (*d*).

CLARK V. ECCLES.

Solicitor's lien—Its extent and how waived

In a suit to wind up a partnership, the plaintiff's solicitor carried on proceedings till a decree was obtained and some progress made with the reference thereby directed. The plaintiff then became embarrassed, proceedings were stayed for a few months, and plaintiff at length assigned to a creditor in whose name acting by another solicitor, the suit was revived and a sum was ultimately found due to him. *Held* that the solicitor of the original plaintiff had not lost his lien for costs, but was entitled to be paid, next after the satisfaction of the costs of the solicitor of the plaintiff who had conducted the suit to its conclusion out of the fund realized.

[May 10, 1871.]

This suit was originally commenced by the late *Chas. I. Carroll*, as one of the members of the partner-

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(*a*) Irving v. Munn, 1 Cham. R. 240.
(*b*) Bank of Montreal v. Ketchum, 1 Cham. R. 117.
(*c*) 13 Gr. 184. (*d*) Con. Gen. Order 383.

1871.

Clark v. Eccles

ship firm of *Eccles, Carroll, and Doyle*, to wind up the partnership. Mr. *Davis* conducted proceedings as *Carroll's* solicitor, from the filing of the bill till 23rd October, 1868, obtaining a decree which directed the usual partnership accounts to be taken, reserving further directions and costs. Mr. *Carroll* becoming embarrassed in circumstances, was unable further to prosecute the suit, and in February, 1869, being pressed by *Blellock*, a creditor, was forced to assign to Mr. *S. C. Duncan-Clark*, trustee on behalf of creditors, his interest in the partnership and suit. The suit was then revived and carried on by *Clark's* solicitors, who ultimately obtained a decree amounting for debt and costs to $1,182.

Mr. *Davis* claiming that he had a lien on this for his costs as former solicitor, an order was taken referring it to the Master to ascertain whether such lien existed, and the extent thereof. It now appeared in evidence that Mr. *Davis* had not had a separate office, but occupied part of Mr. *Carroll's*, while engaged in the suit. Mr. *Carroll* becoming embarrassed, *Davis* refused to advance disbursements required in the Accountant's office, and proceedings came to a stand still, and so remained in and from the 22nd October, 1868, till February, 1869, when *Carroll* assigned to *Clark*. The papers were obtained by the solicitors for *Clark* from *Carroll*, and the suit continued at *Clark's* risk and expense.

Statement.

Mr. *J. C. Hamilton*, for *Clark*, argued that *Davis* had no lien on the fund: such lien must be either through possession of papers or obtaining a fund. The lien on the papers was lost when they were left in *Carroll's* office, and the solicitor refused to proceed further (*a*). The lien on the fund only arises when the fruits of litiga-

(*a*) Sullivan v. Pearson, 38 L. T. N. S. B. 65; *Re* Pulbrook, 4 L. R. Chan. A. 627.

1871.

Clark v. Eccles.

tion are actually obtained. These were secured by and at the expense of *Clark* whose claim they are inadequate to satisfy *(a)*. The assignment from *Carroll* to *Clark* was compulsory and for good consideration, and should be held to have the same effect as an assignment in Bankruptcy which would over-ride the solicitor's lien *(b)*.

Mr. *Davis, contra,* shewed that the present plaintiff had taxed $280 for costs of the period in the suit conducted by him. He shewed that he was willing to proceed on being supplied with disbursements. He cited *Cross* on Lien, 216; *Ley* v. *Brown (c), Daniell's* Chancery Practice, 698.

Judgment.

MR. BOYD, MASTER IN ORDINARY.—Courts of Equity have gone beyond Courts of Law in giving effect to the solicitor's lien for costs. They have regarded his claim in the light of an equitable assignment of so much of the fund involved as will suffice to satisfy it. When the fund is in the hands of the Court it will protect the interests of its officers, and deal with them *ex æquo et bono.* I have found no case precisely like the present. The papers in the suit belonging to the former solicitor have in some way passed out of his hands—how, does not appear; and the usual course adopted in the reported cases of an order preserving the lien of the first solicitor upon his successor being appointed, was not, and probably could not have been followed here. There is no evidence of any waiver of lien on Mr. *Davis's* part—the evidence is quite of a contrary character, and notice of his assertion of lien almost continuously from the period of the change is admitted by the present plaintiff.

(*a*) O'Brien v. Lewis; 4 Giff. 396 & 9 Jur. N. S., 765.
(*b*) Haymes v. Cooper, 33 Beav. 431. Cross on Lien, 242.
(*c*) 1 Chamb. R. 180.

1871.

Clark v. Eccles.

The plaintiff argues that the lien does not arise here because there is nothing on which it can attach—not on the papers, (and in that I agree), nor on the moneys in Court, for this fund was not realized, nor was it ascertained when the retainer of Mr. *Davis*, as plaintiff's solicitor, was determined. It is important to note how the retainer was determined, not by the solicitor's act or default, the evidence shews, but by the assignment of the subject matter of the suit to the present plaintiff by Mr. *Carroll*, under pressure by his creditors. Now, if there was at that time any right of lien, it was clear that such an assignment, the act of the client and not of the law as in a case of bankruptcy, could not derogate from the solicitor's rights, *Haymes* v. *Cooper* (*a*). It is fair to hold in support of the solicitor's right to compensation, and in view of the fact that $280 has been taxed as costs, between party and party during the period of his solicitorship that his lien attached, upon the fund being realized through the exertions of the succeeding solicitor entering upon the labours of the first. This view derives support from the case of *Kellett* v. *Kelly* (*b*), where the attorney for plaintiff having died in the progress of the cause before any fund was realized or any decree made, and the cause was conducted to a successful issue by another solicitor, it was held that the representatives of the deceased solicitor had a lien upon the fund ultimately realized for the costs of that suit due down to the time of the decease.

Judgment.

The language of Vice-Chancellor *Wood*, in *Cormack* v. *Beisly*, as reported in Appeal (*c*), is also noteworthy: he said, that to him it appeared on principle that the solicitor who had last conducted the suit was the person who ought to take his costs first. Even if a solicitor was discharged by a client, he could not insist upon continuing the suit in order that he might work

(*a*) 33 Beav. 431. (*b*) 5 Ir. Eq. R. 34. (*c*) 3 DeG. & J. 162.

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out his lien; nor could he probably even then claim priority over the new solicitor who conducted the cause to an end. The decision was affirmed in all respects, by the Lords Justices. Reference may also be made to *Potter* v. *Hyatt* (*a*), and *Mornington* v. *Wellesley*, (*b*).

The cases cited by Mr. *Hamilton* do not afford any guidance on the present application: they were cases where the question arose in respect of a retaining lien which is usually lost when the papers go out of the solicitor's possession, or where the suit founded in damages and a compromise was effected pending litigation, the result of the suit being itself doubtful, or where the proceedings were under the English Bankruptcy Act. The true rule to be deduced from the cases is, that where there is a fund in Court realized by the exertions of two or more solicitors succeeding each other, each solicitor contributing to that result, has a lien upon the fruits of the litigation. This lien exists in all cases where the solicitor has been discharged by the act of God or of his client before the actual realization of the fund, and it becomes or may be made operative when the money is in the custody of the Court. *Brady*, C. B., says, in *Kellett* v. *Kelly* when a Court of Equity gets possession of funds it holds them for the benefit of the party who can shew that he has an equitable title thereto; and any person is entitled to consider that the Court is in possession for his benefit of so much of the fund as he can establish a claim to in right of his lien; and *Richards*, B., in the same case, "if the client discharges his solicitor, the latter has a lien on the fund."

Judgment.

As to the scope of the lien the cases all point one way, that it extends to the costs in that particular

(*a*) 2 Y. & C. 112.

(*b*) 4 Jur. N. S. 6.

suit taxed between solicitor and client. Following *Cormack* v. *Beisly*, I declare in favour of Mr. *Davis's* lien to this extent, out of the funds in Court after Mr. *Hamilton's* lien thereon for his costs of this suit, taxed in the like way, is satisfied.

1870.

Clark v. Eccles.

BRADLEY v. BRADLEY.

Interim alimony.

On an application for interim alimony, the validity of the alleged marriage cannot be tried. If a marriage *de facto* is proved, it is sufficient.

But to obtain an order for interim alimony, the plaintiff must shew she is in want of means of support.

When the parties had been living separate for four years, and the wife did not allege she was in want of means of support, and the husband swore she was in better circumstances than he was, an order was refused.

[June, 1871.]

Statement.

The plaintiff applied for interim alimony, alleging her marriage with the defendant in 1839, subsequent cohabitation until 1867, and the birth of eight children, issue of the marriage. The defendant answered, admitting the cohabitation, but disputing the validity of the marriage, and he now filed an affidavit to the same effect. On this ground he resisted the granting of an order.

Mr. *Downey*, for the plaintiff.

Mr. *Delamere*, contra.

McGrath v. *McGrath* (*a*) and *Cullen* v. *Cullen* (before the late Chancellor), were referred to in the course of the argument.

(*a*) 2 Cham. R. 411.

1870.

Bradley v. Bradley.

MR. TAYLOR REFEREE IN CHAMBERS.—On an application for interim alimony, the validity of the alleged marriage cannot be tried and decided. If a marriage *de facto* is proved, that is quite sufficient for the purposes of the motion: *McGrath* v. *McGrath* (*a*), *Miles* v. *Chilton* (*b*), *Bird* v. *Bird* (*c*). And this is so even in a suit for nullity of marriage brought by the husband, and in which the pretended marriage is alleged to have been procured by the fraud of the wife: *Portsmouth* v. *Portsmouth* (*d*).

Here the fact of a marriage ceremony having been performed is clearly proved by the production of the marriage certificate. Indeed the husband, by his answer and affidavit, admits the marriage ceremony, and twenty-eight years' cohabitation. The ceremony was performed by a justice of the peace, under the 33 Geo. III., ch. 5, and the certificate recites that no clergyman of the Church of England was living within eighteen miles of the parties, and that the previous notice required by the Statute had been duly given. The defendant's objections to the validity of the marriage are, that notice was not given, and that there was a clergyman within the prescribed distance, so as to deprive the magistrate of the power of marrying.

Judgment.

The plaintiff's right to interim alimony, so far, is clear. There is, however, another point to be considered. These parties have been living separate and apart, for over four years, and the plaintiff does not in her affidavit allege that she is in any want of means, or that she requires alimony for the purposes of her support. The husband, in his affidavit, states positively that the plaintiff is in far better circumstances than he is. He says, that when they separated, he gave her

(*a*) 2 Cham. R. 411.
(*b*) 6 Notes of Cases, 642,
(*c*) 1 Lee, 211.
(*d*) 8 Add. 67.

$400 and the household furniture, and that she is now keeping a boarding-house, with from eight to fifteen boarders; that she owns a lot of land on which is a valuable quarry, from which she derives a considerable income; that she has money to a considerable amount invested at interest; and that she has stated she has more money to loan. All this is not denied, and, as it is not, following *Goodheim* v. *Goodheim* (a), I must decline to make any order for alimony *pendente lite*.

ROBERTSON v. GRANT.

Garnishee proceedings—Costs of parties unnecessarily served—Trial of a matter of fact—Stamp Act—Equitable assignment.

When a party unnecessarily served with a notice of motion appears thereon, he will be allowed his costs.

A Judge of the Court will, when it appears conducive to the interest of suitors, and a saving of expense, instead of directing an issue, himself try a question of fact arising on an application before him in Chambers.

A garnishee order granted by the Court on an application in Chambers is regular.

Where a party gave a draft on a corporation indebted to him, but the proper stamps were not on the draft when the same was discounted, and the holder neglected to put on double stamps as required by the Statute, it was held not to constitute an equitable assignment of the fund of the drawer in the hands of such corporation. But the drawer having written to the corporation directing them to pay the amount of such draft from the fund coming to him, such letter was held to constitute a good equitable assignment.

[May, 1870.]

Statement.

The points stated in the head-note arose out of certain garnishee proceedings, in which the plaintiff was the judgment creditor, the defendant the judgment debtor—

(a) 2 Sw. & Tr. 250.

1871.

Robertson v. Grant.

a sum due the defendant was attached in the hands of the garnishee under an order issued in Chambers—the order was served on the judgment debtor, and the garnishee, who, with a third party claiming the fund under an assignment, appeared to oppose the order, the matter came on to be heard before *Strong*, V. C.

Mr. *Holmested* and Mr. *T. Moss* appearing for the plaintiff. Mr. *A. Hoskin* and Mr. *J. Hoskin*, for the claimants, the assignees, and Mr. *Cooper*, for the judgment debtor.

On the argument of the matter in Chambers, a question arose as to the *bona fides* and the sufficiency of the assignment, which it was considered the affidavit, evidence, and depositions, did not satisfactorily settle—the judge therefore directed the matter to be tried before him sitting in Court.

Statement

The case accordingly came on for argument, on the day appointed, all the parties appearing by the above named counsel.

A suggestion was made as to the jurisdiction of this Court in garnishee matters, when it was conceded that the jurisdiction existed.

A question arose as to the want of notice of the assignment to the garnishees. On this point the following authorities were cited:—*Watts* v. *Porter* (*a*), *Beaven* v. *Oxford* (*b*), *Nicholls* v. *Roseman* (*c*), *Pickering* v. *Ilfracombe* (*d*), *Simpson* v. *Prothero* (*e*), *Hirsch* v. *Coate* (*f*).

Counsel for the plaintiff conceded the point.

(*a*) 23 L. J. N. S. Q. B. 357.
(*b*) 6 D. Mc & G. 492.
(*c*) 5 C. B. N. S. 480.
(*d*) L. R. 3 C. P. 235, 249.
(*e*) 26 L. J. N. S. Chan. 671.
(*f*) 25 L. J. C. P. 315.

1871.

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The question of the sufficiency and *bona fides* of the assignment having after the examination of witnesses and argument been decided in favor of the assignees, the order was set aside with costs.

Mr. Cooper, on the part of the judgment debtor, asked for costs.

This was opposed on the ground that the judgment debtor was an unnecessary party to the proceedings, he attended at the risk of costs.

Mr. *Cooper* cited *Clarke* v. *Simpson*, L. R. 6 Eq. 336.

On the question of what constitutes an equitable assignment, the following cases were cited: *Farquhar* v. *City of Toronto* (*a*), *Douglass* v. *Davidson* (*b*), *Exparte Smith* (*c*), *Robertson* v. *Nesbet* (*d*). The following were also referred to in the course of the argument: *Bostwick* v. *Shortiss* (*f*), *McLean* v. *Bentley* (*g*), *Bowman* v. *Bowman* (*h*), *Re English* (*i*).

Judgment.

STRONG, V. C.—At the close of the argument I expressed the opinion, which a subsequent perusal and consideration of the evidence has only strengthened, that Messrs. Campbell & Cassells acted in perfect good faith in making the advance. I think the draft was not sufficiently stamped. Mr. Campbell says the instrument had not the stamps cancelled when it came into the possession of his firm, and that they were subsequently cancelled either by himself or Mr. Cassells. The Statute in such a case (31 V. ch. 9, sec. 11) clearly requires double stamps, which ought therefore to have

(*a*) 12 Grant 189.
(*b*) Ib.
(*c*) 3 Swan 393.
(*d*) L. R. 3 C. P. 264.
(*e*) Ib. 138.
(*f*) 1 Ch. Cham. R. 69.
(*g*) *Ib.* 197.
(*h*) Ib. 172.

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been affixed: *Lowe* v. *Hall* (*a*). As to the letter of the 25th March, 1870, I think beyond all question it constituted a good equitable assignment; and as such I do not think it can be said to be an instrument which requires to be stamped, as a bill of exchange or draft, within section 2 of the Stamp Act of 1867: *Diplock* v. *Hammond* (*b*). I am therefore of opinion that this motion must be refused with costs. I think the defendant is entitled to his costs on the authority of *Clarke* v. *Simpson* (*c*), to which I have been referred by *Mr. Cooper*. I understood all parties to agree that if I determined that there was a good assignment the attaching order should be discharged; and if I am correct in this understanding, the order to be drawn up on this motion may discharge it accordingly.

Judgment.

CITY BANK v. MAULSON.

Trustees accounts—Liability of co-trustees for acts of agents, &c.—Interest, &c.—Compensation to trustees.

A trustee is bound to exercise a prudent supervision over the acts of an agent, or a co-trustee appointed or acting as agent or manager, for his co-trustee; and where he neglects this duty he makes himself liable for losses occurring through the acts of such agent or manager.

But a trustee in this position was not held liable for moneys received by the agent or co-trustee acting as manager, which were not entered on the books (to which the trustee charged had access) and which he could not have discovered by any vigilence he might have used.

A trustee is liable for the acts of an agent in whose appointment he has concurred, and whose defalcations would have been discovered by an ordinary inspection of the books kept by him.

(*a*) 20 U. C. C. P. 244. (*b*) 5 DeG. McN. & G. 320.
(*c*) 6 L.-R. Eq. 336..

1871.

City Bank v. Maulson.

Where compensation was given to trustees by the trust deed, not in a lump sum, and they had failed in some points of their duty, the Master did not consider that he could deprive them of compensation, but held that he could determine on the value of the work done, and make a corresponding allowance.

Interest held to be allowable, on a preferred debt consisting of drafts and promissory notes from the date until paid, and pending suit.

[May, 1871.]

The bill was by a creditor on behalf of himself and other creditors. It was shewn that there was a deficiency in the assets of about $4000. The defendant *Woodside* set up that his co-trustee *Maulson* received the money, and that he, *Woodside*, was not liable for it. The former Accountant, Mr. *Turner*, had ruled that *Woodside* was liable for the money. The books shewed the money to be in the hands of the assignee (*Maulson*). Mr. *Woodside* had joined in bringing in his accounts charging the trustees with the sum of $4,405.05, but he had personally kept no accounts, but merely brought in his accounts as they appeared in the books of *Maulson*.

Statement.

Mr. *Stephens*, for *Woodside*, urged that upon these facts his client was not liable, that it appeared beyond question, that he never received the money; that *Maulson* was the acting manager; that *Woodside* had been sufficiently vigilant, and when he found there was a likelihood of loss he took steps against *Maulson* and had him stopped from receiving any further moneys, and the creditors at a meeting had ratified what he had done. He could not by any ordinary diligence have discovered *Maulson's* misdealing; the money received was from accounts of an ordinary business, none from rents, he therefore argued that *Woodside* was not liable for *Maulson's* defaults, nor for those of *McKee*; the trustees should be allowed 5 per cent. on the total receipts; that $738 should be allowed to Mr. *Boomer* for balance of salary in winding up his business; that interest on pri-

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vileged claims run after the date of assignment (*a*). *Maulson* was reported to be in good circumstances and was made trustee with the intention that he should be the managing man, and there was no want of vigilance in permitting him to be so, each trustee had the right to collect money, and one is not liable for the receipts of the others unless *negligence* is shewn.

The accounts consisted of numerous small accounts, *Maulson* was paying out sundry moneys and it was impossible that *Woodside* could know that all was not going on right. More than ordinary diligence must have been exercised by *Woodside* if he was to check *Maulson's* conduct; the deficiency arose in the later months; all went right for some time, distinct negligence must be proved to charge *Woodside*.

Statement.

As to liability on *McKee's* account, the creditors approved of *McKee's* appointment, and this took away any responsibility of trustees, unless notice of default was traced or properly imputed to the trustees.

As to remuneration of trustees, no negligence is shewn on the trustees' part. The trust deed provides for payment and the appointment of assistants. Compensation should certainly be made for moneys received by *McPherson* and *Boomer*.

Mr. *Morphy*.—We seek to make *Woodside* liable for money received by *Maulson*, of moneys not acounted for, debts which were lost, as well as money received. As to the alleged exoneration of *Woodside* by the creditors at a meeting, it is not shewn that all the creditors attended such meeting, nor that it was called to exonerate Mr. *Woodside*; it was not called to receive and pass a report that one trustee had embezzled the money, and that the

(*a*) Lewin on Trusts, 489, Hill, 341.

other was to be excused. It was not shewn that *Woodside* was exonerated from seeing that *McKee* did his duty. . No minutes or resolution of the meeting are produced to shew that the meeting approved of *Woodside's* course; it was his business to look at the cash books of *Maulson* in which these entries occur, and his not doing so is negligence; he pleads he was a *passive* trustee; he had no right to be *passive*, and ran his own risk by being so; the same remarks apply to *McKee's* deficiency. As to remuneration, I do not object to remuneration on the collection of moneys, if the money is forthcoming. But where trustees neglect their duty and make a suit necessary, they should not in strictness get any commission, trustees must perform their duty to the letter if they are to get an allowance, they ask commission on money improperly retained.

Judgment.

MR. BOYD, MASTER IN ORDINARY.—For the moneys appearing in the trustees account filed, the defendant, *Woodside*, is responsible in a three-fold aspect of the case. The very frame of the account and of the accompanying affidavit of verification is a manifest admission of the joint receipt of the money in question by both trustees: *Herion* v. *Brocklehurst*, (*a*). But it is alleged by Mr. *Stephens*, that the evidence shews that these moneys were not actually received by *Woodside* but by *Maulson*; and the strongest piece of evidence pointing in this direction is found in the depositions of *Maulson*, taken before the Accountant on 8th May, 1867, in the suit of *Gordon* v. *Bryson*; where he says, "Until *McKee* was appointed I acted solely as the manager." If this was the result of an arrangement between the trustees (and this might be a reasonable deduction from all the evidence,) whereby the management was left exclusively in *Maulson's* hands, then, according to a well-established rule,

(*a*) 29 Beav. 504.

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Woodside would be responsible for *Maulson's* acts as agent of the trustees. In *Hure* v. *Pringle* (*a*), Lord *Cottenham* defines the rule thus:—"The appointment of one trustee to act as manager would not *per se* make the other trustee responsible for his acts, but it would make the trustee so appointed the agent of the other trustees and render them responsible for his acts so far as they would have been responsible for the acts and receipts of a stranger appointed to such office." See also *Toplis* v. *Harrell* (*b*): and *Mickleburgh* v. *Parker* (*c*). The question in such case to determine *Woodside's* liability would be, did he exercise a vigilant oversight over the dealings of *Maulson?* In reference to the employment and supervision of agents Lord *Hardwick* lays it down that the trustee is to act prudently for the trust as for himself, and according to the usage of business; and that if, notwithstanding, loss occurs he shall not be charged because he has acted in the usual method of business (*d*). Now here the manager's books shewed, various sums of money received by *Maulson*, which were not paid in to the trustees account at the bank. Mr. *Woodside* being agent of the bank, had constant access to that account as well as to *Maulson's* books: the usual method of business would have been to have compared the two accounts and have checked *Maulson's* dealings thereby. "Mr. *Woodside* knew that the very purpose of the trust was to get in the assets of the *Boomer* estate as soon as possible for the benefit of creditors, and the usual method of business would have been from time to time to look at *Maulson's* books to see what progress was being made. Any such inspection of *Maulson's* books would have disclosed the fact of the retention of the trust moneys by him, and it was a duty cast upon *Woodside*, the neglect or the perfunctory performance of which fixes him with liability.

Judgment.

(*a*) 8 Cl. & Fin. 288.
(*b*) 19 Beav. 423.
(*c*) 17 Gr. 503.
(*d*) Exp. Belchier: Amb. 219.

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But again, if *Maulson's* management was not the result of any arrangement between the trustees, but merely the undesigned action of one trustee exercising the power he unquestionably has of getting in the trust fund without the privity of the other, then the argument is, that only one trustee having collected the money, the other not having received it, is not liable. The old cases cited for the defence have been considerably modified by later decisions, and the present rule is, that if a trustee knowing of a breach of trust by his co-trustee, or having the means of knowledge by the exercise of ordinary vigilance, stands by and permits such breach of trust to go on, he is accountable therefor, equally with the person actively guilty: *Booth* v. *Booth* (*a*); *Taylor* v. *Millington* (*b*); *Styles* v. *Guy* (*c*); *Larkin* v. *Armstrong* (*d*); *Sovereign* v. *Sovereign* (*e*). In a late case before *James*, V. C., *Joint Stock Discount Co.* v. *Brown* (*f*), it was held that a director of the Company otherwise innocent, was answerable for breaches of trust committed by other directors, of which he was aware, and against which he merely protested. Now, in the present case a duty devolved upon Mr. *Woodside*, of looking at the books kept by *Maulson*, and of bestirring himself in some measure in the business of the trust. These books would have disclosed that the moneys received were not being properly and punctually paid into the bank; it lay upon him to find this out from the books of the trust, and to put a stop to it; and herein failing, the negligence is sufficient to render him chargeable for the loss resulting from malversations which could have been so easily discovered and remedied. (In his answer in *Gordon* v. *Bryson*, *Woodside* admits having examined the books of the estate.)

Judgment.

This is, however, in my view, the limit of his liabi-

(*a*) 1 Beav. 125. (*b*) 4 Jur. N. S. 204. (*c*) 1 Mc. & G. 422.
(*d*) 9 Gr. 401. (*e*) 15 Gr. 559. (*f*) 17 W. R. 1037.

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lity, on this branch of the case. As to moneys allowed on the surcharge which do not appear in the books of the trust, there is no evidence to warrant charging Mr. *Woodside* therewith. It is not to be presumed that if he asked *Maulson* about them any confession or revelation would have followed. No notice or means of knowledge is brought home to the trustee sought to be inculpated: *Williams* v. *Nixon* (*a*); *Lumley* v. *Sherburne* (*b*).

In *Turquand* v. *Marshall* (*c*), Lord *Romilly* says, "I am of opinion that the directors who may not have examined the books, must be taken to be liable for all the consequences which would properly flow from the fact, if they had been acquainted with the contents of them. It was their duty to be so acquainted, and it was a duty which they had undertaken to perform by becoming directors."

Judgment.

As to the loss of moneys resulting from *McKee's* defalcations, Mr. *Woodside* is responsible therefor upon the evidence. The trust deed gives express power to appoint agents. Then the trustee's duties are two-fold; first, to exercise his best judgment and discretion in choosing a proper and responsible person; second, to maintain vigilant superintendence over the dealings of the agent after his appointment: *Horne* v. *Pringle* (*d*). Now, the action of the meeting of creditors may be assumed to have warranted Mr. *Woodside* in continuing *McKee* as the actuary and manager of the estate so far as suitability was concerned, but it certainly did not relieve the trustees from using diligence in supervising the agent's doings: See *Killre* v. *Sneyd* (*e*). An inspection of the books kept by *McKee* would have shewn that something was wrong, and would have no

(*a*) 2 Beav. 472. (*b*) 2 W. & T. L. C. 778 & Am. Notes.
(*c*) L. R. 6 Eq. at p. 130. (*d*) Cl. & Fin. 287.
(*e*) 2 Moll. pp. 199, 200.

doubt led to his detection and removal. Mr. *Gordon's* evidence is, that *McKee's* books were very badly kept. If the trustees had examined the books they would have seen that they were not properly kept. Any ordinary inspection would have revealed this. The conclusion is, that this class of losses occurred in consequence of an unwarranted and improvident reliance being placed upon the agent by the trustees.

As to compensation, the deed expressly provides that the trustees may retain and reimburse themselves a reasonable compensation for their services in and about the trust, as a first charge. If by the deed one lump sum were to be paid to the trustees for their personal services, it may be they would require to shew performance to the letter to entitle them to receive it, but when the remuneration is provided for as in this case, it is for the Master to determine upon the value of the work done, and make a corresponding allowance: *Ellison* v. *Airey* (*a*); *Willis* v. *Kibble* (*b*); *Jackson* v. *Hamilton* (*c*). They do not forfeit all right to compensation because they have failed in some points of their duty. In arriving at the amount, the decisions touching commission to trustees under the statute, will afford safe guidance: see *Robinson* v. *Pett* (*d*). If a memorandum is made out by the solicitors, of the amounts collected by each trustee, distinguishing between sums in the accounts and surcharged, and the liability wherefor was disputed, and also of the amounts paid out by each trustee, with the dates of the large amounts, I shall upon this being laid before me fix the compensation.

Judgment.

Interest at six per cent. should be charged upon all the moneys set forth in the trustees account not properly applied, but no interest should be charged

(*a*) 1 Ves. Sr. 115.
(*b*) 1 Beav. 559.
(*c*) 3 J. & Lat. 702.
(*d*) 2 W. & T. L. C. Am. Notes.

1871. upon the sums appropriated by *McKee: Sovereign* v. *Sovereign* (*a*).

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I declined to entertain Mr. *Boomer's* claim for compensation at the argument. The law is distinct upon the point as laid down in *Worrall* v. *Harford* (*b*), where Lord *Eldon* held that the indemnity of the trustees under a deed of trust does not give the persons employed by them a right as creditors against the trust fund, and this, apparently, even though the trustees are charged not to be solvent.

With regard to the premiums paid on the life policy, they should be allowed to *Woodside*, if he consents that the moneys to be realized therefrom be applied on *Maulson's* defalcations, with which he, *Woodside*, is not chargeable. Otherwise, they will be disallowed to him.

Judgment.

There remains the question raised by the plaintiff as to the *Gordon-Bryson* transactions. The costs of that litigation, as I understand, were disposed of on further directions; if so, the matter is surely *res judicata*, and not now to be agitated by the present plaintiffs, who were co-plaintiffs in that suit. It is clear upon all the facts that *Woodside* should not be be charged with the loss in that affair. The *Bryson* liability arose when *Maulson* kept the books and received the moneys. It appears that through his bad book-keeping he claimed in the books several hundred dollars, between $600 and $900, according to the different views presented, more than was really found to be due. But I think the main difficulty was with *Bryson*, who claimed that less than $2768 was due, whereas the true amount was nearly double that. The evidence does not lead me to think that even had the books been right, the mutual account could have been adjusted without a suit. *Woodside* is not to be

(*a*) 15 Gr. 563. (*b*) 8 Ves. 4.

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charged because his co-trustee omits something from the books, unless the knowledge or the means of knowledge of that omission is brought home to him. Again, it appears that no information could be obtained from *Maulson*, because at the time his memory was gone, had this not been so, he might have cleared the matter up, but still I do not think a suit would have been avoided.

Bryson's evidence is clear and uncontradicted that no good would have resulted from the assignees suing for the amount. It would only have hastened his suspension. His evidence also shews that if Mr. *Furlow* had not postponed the sale by the sheriff, enough would probably have been realized to satisfy the execution. And he states further, that if the claim had not been pressed by the receiver the whole amount would have been paid. Here then is an accumulation of circumstances in evidence before me, which renders it impossible to say that *Woodside* has so failed in duty that he should make good all or any of the loss occasioned by the *Gordon* and *Bryson* suit.

Judgment.

Another point was touched upon, but not much pressed by the defendant, namely, whether interest should run upon the preferred debt of the plaintiffs to the time of payment, or only to the date of the assignment. Where the debt is especially one expressly carrying interest, no doubt the interest runs to the period of distribution: *Bateman* v. *Margerison* (*a*). The preferred debt in this case consists of drafts and promissory notes, upon which, by implied contract and by custom, interest runs from the time of payment: *Laing* v. *Stone* (*b*); *Upton* v. *Lord Ferrers* (*c*); and the principle of the decision at the Rolls affirms the

(*a*) 16 Beav 477. (*b*) 2 M. & R. 561.
(*c*) 5 Ves. 801.

1871.

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right to interest till the debt is paid. It was not at first the practice of the Master to allow interest on promissory notes, but when this course was adopted at law, equity followed: *Bell* v. *Free* (*a*); *Parker* v. *Hutchinson* (*b*); *Upton* v. *Lord Ferrers* (*c*); *Lowndes* v. *Collens* (*d*). At law the jury is directed to give interest and have no discretion, and in that view interest is in ordinary cases an inseparable incident of bills of exchange and promissory notes, from the time they fall due. *Lithgow* v. *Logan* (*e*). The interest will also run pending suit, no matter what the length of time: *Reilly* v. *Fitzgerald* (*f*).

Judgment.

BEATY V. RADENHURST.

Sale under decree—Settling advertisement.

Under a decree for the sale of land or a competent part thereof, in it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and if the mortgagor considers that too much is offered he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that the unsold lots will be withdrawn from sale when the debt is realized, if that course is intended to be taken.

The confirmation of a sale may be opposed before the Master, and the sale disallowed on grounds which would afford material for a motion to set aside the sale.

Where the confirmation of a sale is opposed on the grounds of there having been an unnecessary number of lots sold, the purchaser should be notified.

Semble, the objection will not prevail against an innocent purchaser, when urged against the confirmation of the report on sale.

[May, 1871.]

In this case certain lands were directed to be sold, and the Master directed them to be sold in lots, according to a plan produced. The defendants were

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(*a*) 1 Sw. 90. (*b*) 3 Ves. 34. (*c*) 5 Ves. 801.
(*d*) 17 Ves. 27. (*e*) Ceo. Coop 29.
(*f*) Pr. R. temp. Sugden 122, S. C. 6, I. Eq. R. 335.

represented on the settling of the advertisement for sale, but whilst urging that the lots should be divided according to another plan previously registered, did not then contend that more land was being offered for sale than was necessary to pay the plaintiff's claim. The lots when sold realized more than the plaintiff's claim, and on the settling of the report on sale the confirmation of the report was opposed on the grounds that the last lot sold was irregularly and improperly sold, and that the sale should have been stopped.

1871.

Beaty v. Radenhurst.

Mr. *Smart*, for the plaintiff.

Mr. *Cooper*, for the defendants, cited *Barker* v. *Eccles* (*a*).

The purchaser was not represented, not having been notified.

MR. BOYD, MASTER IN ORDINARY.—The purchaser here is a stranger to the suit—an innocent person against whom on an application to set aside the sale, the Court always "finds it difficult to interfere." Per *VanKoughnet*, C., in *McAlpine* v. *Young* (*b*). The confirmation of the sale as to the last parcels sold is opposed by the defendants who were present at the settling of the advertisement, who must be taken to have then informed themselves of the likelihood of the property realizing enough, or more than enough, to satisfy the plaintiff's claim. The purchaser is not before me, and that of itself is a fatal objection against his being deprived of his right as highest bidder, behind his back (*c*). At first I doubted my jurisdiction, but in *Rodgers* v. *Rodgers* (*d*) the confirmation of a sale was opposed before the Master and the opposition allowed by him in matters that could have

Judgment.

(*a*) 17 Grant 281.
(*b*) 2 Cham. R. 171.
(*c*) See Gen. Ord. 388.
(*d*) 13 Gr. 148.

1871.

Beaty v. Radenhurst.

been used on a motion to set aside the sale under the General Orders. This is a precedent for the present application.

The defendants rely upon the final order providing for a sale of the premises or "a competent part thereof," and cite the language of the Chancellor, in *Barker* v. *Eccles* (c), that the sale should always be of only of so much of the mortgaged premises as will suffice to satisfy the mortgage debt. The manifest meaning of the Chancellor is, that there is to be only one advertisement and one sale, and that if enough to satisfy the mortgage debt is made out of one or more of several parcels offered, the rest should not be sold. In such a case I suppose it would be the duty of the vendor's solicitor to satisfy himself that enough was realized, and to withdraw the parcels not required to be sold. But this I think he could not rightly do, unless an express reservation to that effect were made on settling the advertisement, and duly published for the information of all parties and the public. In the present case there was no such reservation, and there was in fact, no stoppage of the sale and no withdrawal of any of the lots advertised to be sold. How can a purchaser without notice, be deprived of his rights under the standing conditions of sale of this Court? The defendants might have attended the sale, and given the audience notice of their present contention. They might have bid in the lots which they now claim should not have been sold. They might have had the advertisement settled so that purchasers would have been notified that upon a certain amount being realized no more lots would be offered.

Judgment.

Here we find that the same person is the highest bidders for several lots, which it is contended were improperly sold, enough being realized without them. Now,

(c) 17 Gr. 281.

if this contention were to prevail and the Court were to deprive this purchaser of one of his lots, might he not have the right to repudiate his other purchases: *Price* v. *Price* (*a*); *Gregg v. Glover* (*b*). This right, if exercised, would necessitate another sale to make up the deficiency. The defendants do not place their rights any higher than this, that there has been an irregularity in the sale of the last lots. But it has often been decided that a *bonâ fide* purchaser is not to suffer, or lose any advantage from an irregularity in the proceedings in the suit, or at the sale. *Dickey* v. *Heron* (*c*); *Gunn* v. *Doble* (*d*); *Collins* v. *Denison* (*e*).

It is clear that the purchaser could not at his own instance be relieved from his contract in a case like the present. Where there is jurisdiction to sell to satisfy certain claims, irregularities and errors in taking the accounts and in calculating such claims will not invalidate the sale or prevent a good title being made: *Calvert* v. *Godfrey* (*f*). Here there was power to sell, and if more land was sold than was necessary to pay the plaintiff, the purchaser would not be discharged on that score. See *Thomas* v. *Townsend* (*g*), *Lord Rendlesham* v. *Meux* (*h*). If the purchaser, however, is willing to abandon his right to any lot sold in excess (as was suggested might be done here), and if the defendants oppose the confirmation of the sale as to such lot, then the plaintiffs would seem to have no right or even interest to seek that that particular purchase should be carried out.

Judgment.

The proper course is undoubtedly for the parties and the mortgagor primarily to bring the matter up, when

(*a*) 1 Sim. & St. 386.
(*b*) 1 Ir. Eq. 211.
(*c*) 1 Cham. R. 149.
(*d*) 15 Gr. 655.
(*e*) 2 Cham. R. 465.
(*f*) 6 Beav. 97.
(*g*) 16 Jur. 736.
(*h*) 14 Sim. 249.

1871.

Beaty v. Redenhurst.

the advertisement is being settled. The mortgagor it is who should usually see to the parcelling out of the land, and who should bear the expense thereof, *Heward* v. *Ridout* (*a*); he it is who should seek protection for such part of the mortgaged premises as it may not be necessary to sell. It is for him to make out that the whole needs not to be sold; that portions thereof can be sold separately without injury to the plaintiffs and others interested; that the land can be properly divided so as to raise the particular sum required out of one portion to the exclusion of the rest; that the mortgagor will not be prejudiced by any restrictive or reservatory clause in the particulars of sale.

Then, according to the circumstances of each case the Master will either direct that the whole property be sold unreservedly, or that a certain competent part of it be sold to the exclusion of the remainder, or that the whole be offered, but only such lots sold as will realize a certain sum to be specified in the advertisement.

Judgment.

The defendant will have to run the risk of an insufficient quantity being advertised or sold, and in such case the land will be onerated with the expense of a second or supplemental sale. The Master and the plaintiff having the conduct of the sale, had better err on the safe side, and rather let more than less than enough be offered and sold. A liberal margin should be given, so that everything that can possibly be due to the plaintiff and incumbrancers (if any) for debt, interest, and costs, may be provided for, in the fund realized from the sale. In the present case, the total sum estimated as claimable by the plaintiff down to the 30th May, (at which time he may be supposed entitled to get his money out of Court,) will be, including taxes and probable costs, about $2326. Judg-

(*a*) 1 Cham. R. 230.

ing from this estimate it appears that he was compelled to sell all but the last one or two lots, and perhaps circumstances may be suggested which would have warranted him in selling even these. Upon this, however, it is not needful for me to decide in the absence of the purchaser. I must pass over the defendant's objections, and proceed to confirm the sale in the usual manner. I refer to *Lubwych* v. *Winfred* (*a*).

1871.

Beaty v. Radenhurst.

DENISON v. DENISON.

Master's office—Proceedings on warrant.

A warrant should be so underwritten as to explain clearly what proceedings are intended to be taken under it; and if proceedings are taken of which the warrant gives no notice, or which are inconsistent with the underwriting, in the absence of parties interested, and who might if present have opposed them, such proceedings will be set aside and the benefit of them refused to the parties so irregularly proceeding.

Where a warrant was underwritten "to settle advertisement for sale of the balance of the unconverted assets of the estate," and without further warrant the Accountant directed that an offer for certain bonds of the estate be accepted, and the purchaser, a party interested under the will, made a profit on such purchase,—the Master, upon the question being submitted to him, declared such profits of the sale to belong to the general estate.

[May, 1871.]

Statement.

On 3rd November, 1869, a warrant was granted by the accountant, returnable on 8th November, underwritten "*To settle advertisement for a sale of the balance of the unconverted assets of the estate,*" which appeared to have been served by the plaintiff upon the solicitors for *Ridout* and *Wilson*, and *G. T.* and *R. L. Denison*. On that day, as appeared by the Accountant's book, Mr. *Mulock* brought in a statement of available assets, and offered on behalf of Mrs. *Simms* sixty cents on the dollar for the Northern Railway bonds, or to take them at par upon certain

(*a*) 2 Bro. C. C. 248.

1871.

Denison v. Denison.

collateral security. The Accountant's direction upon this was, that this offer was to be accepted in ten days, unless some better proposal was made on the part of the *Denisons*.

It was conceded that the *Denisons* and their solicitor did not attend upon this appointment, and that no notice was given to them of the Accountant's direction.

It did not appear that there was a regular adjournment, and the matter was next taken up on 22nd November, in presence of Mr. *Hamilton* and Mr. *Mulock*, and no party appearing to oppose the offer of Mrs. *Simms*, the Accountant ordered that she should be the purchaser at the rate offered, and that the receiver might hand the bonds over to her; and that she was to be charged therewith as part of the assets to which she was entitled.

Statement.

No report was made, and the affair was proceeded with on the footing of this order written in the Accountant's book. The receiver handed over the bonds to Mr. *Mulock* on or about the 22nd November, and he forthwith handed them over to his partner, Mr. *Lauder*, who, it was alleged, had a power of attorney to act for Mrs. *Simms*. Very little appeared to have been done in the Accountant's office after this period. Several months after the transfer Mrs. *Simms* sold the bonds at an advance of five cents to her solicitors *Lauder* and *Mulock*, and they on the 13th September, 1870, sold the bonds at an advance of $900 on the price paid by Mrs. *Simms*. The solicitors relinquished all claim to these profits in Mrs. *Simms's* favor, and it is now come before the Master to determine if Mrs. *Simms* or the *Denison* estate was entitled thereto.

Mr. *Hamilton*, for the plaintiff.

Mr. *Graham*, contra.

1871.

Denison v. Denison.

MR. BOYD, MASTER IN ORDINARY.—In the view I take it is not nesessary to consider the question raised whether or not the will disables Mrs. *Simms* from tendering for or accepting the bonds in question. I think the whole proceedings are vitiated by the insufficiency of the underwriting of the warrant to support what was done thereunder in the absence of the *Denisons*. There is no evidence of any assent on their part to, or in fact notice of, the subsequent proceedings, and no evidene of any waiver of their rights. There do not appear to be any such laches in moving, or any such alteration of the position of the parties in the suit as to preclude the present inquiry and adjudication.

Judgment

The body of the Master's warrant is merely addressed to fixing a time to attend—the particular purpose of the meeting is expressed in the underwriting. The whole is analogous to a summons at Common Law, or a notice of motion in Chancery as a foundation for the order subsequently made thereupon. It has frequently been held that the Court should not upon a motion go beyond the terms of the notice of motion or summons (*a*), *Curreen* v. *Walsh* (*b*), *Graham* v. *Chalmers* (*c*), *Burdett* v. *Hay* (*d*). This rule is applicable *a fortiori* when the motion is unattended by the opposite party. See *Pratt* v. *Walker (e)*, *Hutton* v. *Hepworth (f)*. In *Ex parte Carew (g)* it is said that parties served with notice and not appearing thereon are entitled to assume that nothing beyond what is contained in the notice will be asked upon the motion. Here in view of what actually occurred upon the appointment the underwriting was positively misleading. It gave the parties to understand that there would be an advertisement settled for the sale of these

(*a*) Wyatt Off. Reg. 287.
(*b*) 1 Ir. Eq. R. 200.
(*c*) 2 U. C. L. J. N. S. 269.
(*d*) Jur. for 1863, p. 1260.
(*e*) 19 Beav. 261.
(*f*) 6 Ha. 315; 12 Jur. 835.
(*g*) 18 Jur. 889; 23 L. J. Ch. 761.

1871.

Denison v. Denison.

bonds among the other assets, in such a way that competition should be insured. This very notification would intimate that the informal offers theretofore made, both by Mrs. *Simms* and the *Denisons*, were no longer to be entertained, and that steps were to be taken to realize the assets in the usual way, viz., by exposing them in some way to public competition upon a sale under the direction of the Court. None of the parties who failed to appear could suspect upon this warrant that the settling of an advertisement would be dispensed with, that a sale of the bonds would be ignored, and that a simple transfer of them would be made to one of the parties in a summary way, of which no notice was conveyed to the persons making a previous offer. It appears to me impossible that any Court would sanction proceedings so irregular. I now merely act as the Accountant undoubtedly would have done, if the application had been made before him to set aside these proceedings, in declaring that as against the *Denisons*, the transfer in question was not operative, and that the profits of the sale belong to the general estate.

Judgment.

RE DICKSON.

Quieting Titles Act.

The certificate of counsel in support of a petition under the Quieting Titles Act should follow the language of the 8th section of the Act, and state to the effect that he has investigated the title, &c. A certificate of counsel that he had corresponded with the agent of the petitioner on the subject of the various matters set forth in the petition, and believed them to be true, was *Held* to be insufficient.

The schedule of particulars referred to in the petitioner's affidavit should be identified by the Commissioners in like manner as any other exhibit.

[May, 1871.]

MR. TAYLOR, REFEREE IN CHAMBERS.—This is an application under the Act for Quieting Titles. The

certificate of the counsel which is produced states that he has corresponded with the agent of the petitioner on the subject of the various matters set forth in the petitioner's affidavit in support of his petition and believes the same to be true. Such a certificate is not sufficient. The 8th section of the Act says, "the certificate of the counsel or solicitor shall state to the effect that he has investigated the title, &c.," and that "he has conferred with the deponent on the subject of the various matters set forth in the affidavit or deposition." 1871. Re Dickson.

The petitioners' affidavit states "that the deeds and evidences of title, &c., of which a list is contained in the schedule of particulars produced by me in support hereof and herewith shewn to me, and marked with the letter A, are all, &c.," in his possession. A paper is produced, endorsed "schedule of particulars," and on that there is a letter A, but it is not in any way connected with the affidavit, or identified by the Commissioner before whom the affidavit was sworn as the paper, marked A, referred to in the affidavit. This is essential. A fresh certificate from counsel must be procured and the schedule of particulars must be properly marked by the Commissioner before whom the affidavit is sworn. Judgment.

Robinson, Robinson & O'Brien, solicitors for petitioner.

1871.

PARKER v. BROWN.

Neglecting to give notice of answer.

Where a defendant's solicitor files an answer but neglects to give notice thereof, the Court will not order it to be taken off the files, but will extend to the plaintiff the time for taking the next step in the cause, by such time as has been lost by the neglect in giving notice.

[June, 1871.]

Mr. *Arnoldi* moved for an order to take the answer of the defendant off the files, on the ground that no notice of filing had been served: he cited *Johnson* v. *Tucker* (*a*) and *Lewis* v. *Jones* (*b*).

The defendant filed his answer on the 3rd day of June, but no notice of filing the answer was served as required by General Order 46, owing to the neglect of a clerk. The plaintiff now moved to take the answer off the files on account of this omission; the notice of motion having been served on the 19th of June.

Mr. *Smart*, contra, contended that the plaintiff was not entitled to move to have the answer taken off the files; the only penalty the defendant was subject to was, that the filing of the answer counted only from the time of serving notice, and the defendant would have so much longer time to take the next step.

Judgment. MR. TAYLOR, REFEREE IN CHAMBERS.—The Vice Chancellor of England, in *Johnson* v. *Tucker* (*c*), ordered a replication to be taken off the files under similar circumstances, and this case was followed by the late Vice Chancellor Esten, in *Lewis* v. *Jones* (*d*). In the latter case there were also other reasons for taking the replication off the files and dismissing the

(*a*) 15 Sim. 599.
(*b*) 1 Cham. R. 120.
(*c*) 15 Sim. 599.
(*d*) 1 Cham. R. 120.

1871.

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bill. A former irregular replication had been filed and the one moved against, in terms embraced all the defendants, but as to six, or at all events two of them, it was wholly irregular, they not having answered and the bill not having been taken *pro confesso* against them. *Rathburn* v. *Hughes* (*a*), was a case where after a suit had been abandoned and not moved in for eight years, a solicitor other than the solicitor on the record without any order changing the solicitor, filed a replication, giving no notice of his so doing. The whole proceeding was so irregular that when moved against no one appeared to make even an attempt to support it.

There are two English cases more recent than *Jackson* v. *Tucker*, neither of which appear to have been cited to Vice Chancellor Esten, in *Lewis* v. *Jones*.

Judgment.

In *Lloyd* v. *Solicitors' Life Assurance Company* (*b*), where the replication was filed on the 21st of June, and no notice of the filing was served until the 25th of July, V. C. *Wood* expressing disapprobation of making such summary application on a mere slip, refused the motion to take the replication off the files. I think I should do so here also, following that case, and the decision of Vice Chancellor *Wigram*, in *Wright* v. *Angle* (*c*). The language used by that learned Judge is quite unmistakable as to the course to be adopted in such a case. He says: "The object of the 23rd General Order of October, 1842, (our General Order 216,) obviously is, that the plaintiff against whom a step is taken, may have the benefit of the full time allowed by the practice of the Court for proceeding to the next step in the cause. When, therefore, as in this case, notice is not given until the following day, the party entitled to the immediate notice loses some part of the time which the Practice and General Rules of the

(*a*) 3 Cham. R. 160. (*b*) 3 W. R. 640. (*c*) 6 Hare, 107.

1871. Court allow him. Whenever this happens, the Court may adopt one of two courses for correcting the effect of the irregularity, the Court may either give the order a retrospective effect, and render the step which has been taken inoperative, or obviate the consequences of the irregularity by adding to the time allowed to the other party for taking the next step in the cause, the time which had been lost to him by the delay in the service of the notice. In either case the costs of the application must be borne by the plaintiff, whose irregularity has occasioned it. The rule of the Court, which requires the notice to be immediately given, is not confined to replications, but applies equally to demurrers and other proceedings; and I have often had occasion to consider in what way an omission to give the notice should be dealt with. The conclusion I have come to is, that generally speaking the proper course is to extend the time for the next step, and not to treat the step already taken as irregular from the beginning. I did not so decide without conferring with other Judges upon the point, and I was not aware, until the argument upon the present motion, that the Vice Chancellor of England had taken a different view of the case. It is not without the greatest hesitation that I venture to differ from the opinion of a Judge of so much experience, but the point is one on which I feel bound to do so. The conclusion I have come to appears to me to answer every purpose of justice, terminates litigation on the subject, and simply puts the cause in a regular course of proceeding, in a more convenient manner, in my opinion, than is done by holding that a replication regularly filed has become irregular by the subsequent delay in giving notice." His Honour further said that he treated the order requiring notice to be given on the same day as directory.

Parker v. Brown.

Judgment.

It may be said that in the case just quoted from, the notice was served on the following day, and that in

Lloyd v. *Solicitor's Life Assurance Company*, it had been served before the motion was made. I do not think that should make any difference so long as the delay has not been such that extending the time will prevent the opposite party from being injured. In the last case Vice Chancellor *Wood* did not think a delay of thirty-four days in serving notice too long. Here only sixteen days had elapsed between the filing of the answer and the moving against it. If the fact that the party has moved before notice of filing is given is to be alone a sufficient reason for taking the pleading off the files, then a person learning on any particular day that a pleading has been filed that day, could, if the notice was not given, serve notice of motion at ten o'clock the next morning and the Court would be bound to take it off the files.

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To adopt the course I am doing is not to abrogate or set aside the General Order. Neglect to comply with it is followed by a penalty. The penalty, however, is not as the plaintiff seeks here, to take the pleading off the files; but to give the opposite party further time for taking the next step.

Judgment.

All the reported cases are cases in which the pleading moved against was a replication and if the rule is not stringently enforced in such a case, *a fortiori* it should not be in the case of an answer, the taking of which off the files might be followed by more serious consequences. If a replication were taken off the files, the worst that could happen would be a dismissal of the bill for want of prosecution, and the plaintiff could at once, on payment of costs, file another. If an answer were taken off the files the plaintiff could take the bill *pro con* and obtain a decree, shutting out the defendant for ever.

The plaintiff may take an order, giving her twenty-

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eight days from to-day, within which to amend or file replication, putting her in fact in the same position as if the answer were filed to day, and the defendant must pay 20s. costs. If the plaintiff does not wish this, the order will be, as in *Wright* v. *Angle*, and *Lloyd* v. *Solicitors' Life Assurance Company*, refusing the motion without costs.

GILDERSLEEVE v. WOLFE ISLAND RAILWAY AND CANAL COMPANY.

Filing answer without corporate seal.

There is no authority for allowing a corporation to file an answer without seal, except by consent.

Where a stay of proceedings was asked to enable the defendants to apply at law for a mandamus to compel the head of the corporation to affix the corporate seal to the answer, but it was not shewn that the majority of the shareholders approved of the answer; the application was refused with costs.

[June, 1871.]

Statement.

Leave to answer notwithstanding the note *pro confesso* had been applied for, when it was alleged that the seal of the company was in the possession of the plaintiff's solicitor and that he refused to allow it to be affixed to the proposed answer. This refusal was denied on the part of the solicitor, but a clause was inserted in the order then made, giving the defendants liberty to apply, in the event of the plaintiff's solicitor refusing to allow the defendants to affix the seal. The present application was made on the ground of such alleged refusal. The notice of motion asked that the defendants might be at liberty to file their answer without the corporate seal, or that the time for answering might be extended and the defendants allowed to file their answer at any time within ten days after the plaintiff's solicitor should have delivered up to the solicitor for the defendants, the corporate seal, or should have attached

the same to the answer or for such other order as the Court might think proper. 1871.

Gildersleeve v. Wolf Island Railway and Canal Co.

Messrs. *Crooks, Kingsmill,* and *Cattanach,* on the part of the defendant.

Mr. *Edgar,* contra.

MR. TAYLOR, REFEREE IN CHAMBERS.—From the affidavits and the cross-examination on them, I think it is quite clear that there has been no such refusal on the part of the plaintiff's solicitor to allow the seal to be affixed as is alleged. It appears that the seal in question came into its present custody among the effects of the late Overton Gildersleeve. How it came into his possession does not appear. After the order of the 20th May was made, the defendants' solicitor went to the plaintiff's solicitor and asked him if he would allow the defendants to affix it to the answer; or if he would allow him (the defendants' solicitor) to affix it. The plaintiff's solicitor then refused to allow the defendants' solicitor to affix the seal, or to affix it himself; and said he would at once send the seal to Mr. *Ford,* the President of the Company. I do not see what else he could have done, neither of the solicitors had any right to make use of the seal: that could only be properly done by the proper officer of the company. It appears also that the plaintiff's solicitor did then send to Mr. *Ford,* offering him the seal, and that he refused to receive it. The solicitor further swears that he holds the seal at the disposition of the president or any officer of the Company entitled to the custody of it. Judgment.

No other attempt to have the seal put to the answer was made before serving notice of the present motion.

No authority has been shewn for granting the first part of the motion, namely, allowing the defendants to

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Gilderaleeve v. Wolf Island Railway and Canal Co.

file their answer without the seal, indeed that part of it was not touched upon at all when the motion was argued. In fact, no attempt was made to support any part of what is specifically asked by the notice of motion. I cannot grant so much of it as asks that the defendants may have so many days after the seal is delivered to the solicitor for the defendant, or after the plaintiff's solicitor should have affixed the seal to the answer. The defendants' solicitor is not the person entitled to the custody of the seal; nor has the plaintiff's solicitor any authority to affix the seal to any document.

Judgment.

The chief point urged for the defendant was that under the general words "such an order as the Court may think fit," I should grant an extension of time for answering until the defendants can apply to the Court of Queen's Bench, for a mandamus to compel the President to affix the seal. In support of this *The King* v. *Windham (a)*, was cited. There, a bill having been filed in Chancery against the warden and fellows of Wadham College, the warden put in his separate answer, but refused to affix the seal of the College to the answer which the sub-warden, dean, and principal officers of the corporation desired to put in, and the Court of Chancery stayed proceedings by process of contempt against the defendants until they could apply for a mandamus against the warden. The majority of the corporation approved of the proposed answer. In *Bacon's* Abr. Title Corporation E. 2, it is said, that if the majority of the members of a corporation are ready to put in their answer, and the warden who has the custody of the common seal refuses to affix it to the answer, a Court of Equity will stay proceedings against the corporation till an application can be made to the Court of King's Bench to compel him, which that Court will grant. It is not shewn here that a

(a) Cowp. 877.

majority of the shareholders approve of this answer. The plaintiff cannot of course call upon the defendant's solicitor for production of his authority to act for the defendants, but the solicitor has himself in an affidavit volunteered the information as to the source from which he received his instructions. The bill was served upon *Ford*, the president of the company, and the solicitor is instructed to defend by Mr. *Kinghorn*, one of the shareholders only.

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It was argued that it was wholly immaterial whether the majority of the shareholders concurred or not, but I think it is important when a question such as the present arises between the members of the corporation and the head of it. The Court of Queen's Bench would never grant a mandamus to compel the head of a corporation to affix the seal to a document, unless it is shewn to be the act of a majority of the corporation. Otherwise each shareholder might instruct his own solicitor to prepare an answer for the company; and then the Court might have to entertain a dozen applications by shareholders, each pressing to have his answer adopted as the answer of the corporation. The Court could not in such a case decide which should be the answer.

Judgment.

As it is not shewn that a majority of the shareholders approve of this answer, I do not think I should delay proceedings till an application is made for a mandamus; and I cannot say that the plaintiff's solicitor has been guilty of any improper conduct, so I must refuse the application with costs.

1871.

STOVEL v. COLES.

Order 266—Depositions irregularly taken.

Where a subpœna had been sued out under Order 266, and an appointment thereunder given by a special examiner at a time when no motion or other proceeding was pending; It was held to be irregular, and that the depositions taken could not be read.

The attending under such a subpœna was held not to be a waiver of the irregularity, the objection being to the jurisdiction, which no waiver could confer.

[June, 1871.]

Mr. *Barrett* moved on notice, on behalf of John Wallis, for a stay of proceedings until a new next friend should be appointed, or security for costs given.

Mr. *Bain* and Mr. *Devlin*, contra.

Mr. *Arnoldi*, for certain other defendants.

Mr. *Barrett* proceeded to read the depositions of *C. L. Roberts*, taken before Mr. *Esten*, Special Examiner.

Mr. *Bain* objected to the reception of the depositions on the ground that the appointment was taken out before any motion was pending, and the Examiner had no authority to issue an appointment. He cited *McMurray* v. *Grand Trunk Railway Company*, reported in this volume.

Mr. *Barrett*.—It is sufficient if the notice of motion is served before the examination takes place; the appointment is merely a preliminary step.

Judgment. MR. TAYLOR, REFEREE IN CHAMBERS.—I must hold that the depositions have been taken irregularly, and cannot be read. General Order 266 gives a party liberty by writ of subpœna *ad test*, or *duces tecum* to require the attendance of a witness before the Court or a Master or Examiner for the purpose of using his

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Stovel v. Coles.

evidence upon any motion petition or other proceeding before the Court. This must refer to a then pending motion, petition, or proceeding; and no motion or petition can be pending until notice of it is served.

McMurray v. *The Grand Trunk Railway Company*, before V. C. *Mowat*, is an authority for the proposition that until the party is in a position or has a right to examine, no appointment can be obtained or subpœna sued out. There, the defendants desiring to examine the plaintiff for discovery, which they could do only after filing their answer, served him with a subpœna in the regular way; but it was objected that this subpœna bore date prior to the filing of the answer, having been in fact issued before the defendants had acquired the right to examine the plaintiff; and this was held a fatal objection. Here the subpœna was sued out and the appointment obtained at a time when the defendant had no right to examine witnesses for the purposes of this motion, as no motion was then pending.

Judgment.

I do not think the plaintiff has waived her right to take this objection.

In *Smith's* Practice *(a)* it is said a plaintiff may forfeit or waive his right to object by acquiescence or by omitting to object, and permitting the other party to proceed as if he had acquiesced *(b)*. Here the plaintiff did object and had no opportunity of moving, the notice having been served late in the afternoon of the day before the examination took place. Besides, it is a question whether there could be any waiver. If the view I have taken of General Order 266 be correct, the Examiner had no jurisdiction to issue the appointment or take the evidence under it; and though a party may waive his right to object to an irregularity, he cannot by such oversight give jurisdiction.

(*a*) 7th Ed. 235. (*b*) Davis v. Franklin, 2 Beav. 369.

1871.

WEBB v. MCARTHUR.

Costs, when further prosecution of a suit becomes unnecessary.

Where the object of a suit has been attained, the proper course is, for the plaintiff, if he seeks costs, to apply to the defendant to have the question of costs disposed of on motion; unless he does so, he will not be given the extra costs occasioned by going on to a hearing.

Query: Will such a motion be entertained at all, except by consent.

Semble, if the defendant refuses consent to the costs being disposed of on motion, the plaintiff will get his extra costs of going to hearing.

[July, 1871.]

Two motions were made in this suit, one by the defendant to dismiss the bill for want of prosecution with costs to be paid by the plaintiff to the defendant; the other by the plaintiffs tc dismiss their own bill, but with costs to be paid to them by the defendant.

Statement.

The defendant supported his motion by a certificate of the state of the cause shewing that the answer having been filed in the end of 1870, the plaintiff should have carried the cause down to a hearing at the last sittings at Toronto where the venue was laid. The plaintiffs applied to dismiss their own bill asking at the same time costs against the defendant on the ground that the object of the suit had been attained since the filing of the bill, so that its further prosecution was unnecessary.

The facts connected with the case appeared to be as follows: The plaintiff, Mrs. McArthur, having commenced a suit against the present defendant, her husband, for alimony, that suit was settled by the husband conveying a farm to the plaintiffs, *Webb* and *Stokes*, as trustees for the wife. Some years after, McArthur filed a bill in this Court to have the deed cancelled and set aside, which was dismissed by the late Chancellor (*a*). Last year McArthur commenced an action of ejectment

(*a*) 13 Gr. 303.

against the trustees; and the present suit was instituted for the purpose of restraining that action, and having litigation about this property finally put an end to. An injunction was moved for in November last, but before the motion could be disposed of the action of ejectment was called on for trial, and a verdict rendered for the plaintiff at law. The verdict was moved against in term, and the Court of Common Pleas had set it aside, and ordered a verdict to be entered for the defendants at law, the plaintiffs in equity.

1871.

Webb v. McArthur.

Mr. *Foster*, for the defendant, contended that the motion by the plaintiff could not succeed, as the application, if open to the plaintiff, could only be made in Court and on consent: *Fidelle* v. *Evans* (*a*), *Wilde* v. *Wilde* (*b*), *Morgan* v. *G. E. R. Co.* (*c*), *Langham* v. *G. N. R. Co.* (*d*), *Morgan* & *Davy*. On an application of this nature the Court cannot go into the merits: *Wallis* v. *Wallis* (*e*). The rules of the Court as to allowing plaintiff to dismiss his bill without costs ought not to be extended: *Lister* v. *Leather*, per Lord Justice *Turner* (*f*).

Mr. *Fitzgerald*, for the plaintiff, relied on *Sivel* v. *Abraham* (*g*).

MR. TAYLOR, REFEREE IN CHAMBERS.—The plaintiff's make their motion on the authority of *Sivel* v. *Abraham* (*h*), where a bill having been filed for specific performance, the object being to compel the vendor to obtain the concurrence of the testator's heir-at-law in the conveyance, the defendant prevailed on

Judgment.

(*a*) 1 Cox. 27.
(*b*) 10 W. R. 503.
(*c*) 1 H. & M. 78.
(*d*) 1 De G. & S. 503.
(*e*) 4 Drewry 467.
(*f*) 1 De G. & F. 361.
(*g*) 8 Beav. 598.
(*h*) 8 Beav. 598.

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the heir-at-law to execute and then gave notice to the plaintiff proposing that the bill should be dismissed without costs. To this the plaintiff would not agree, but brought the cause on for hearing. The only question being the costs of the suit. The Master of the Rolls considered that the plaintiff was wrong in proceeding as he did, and that he should have made an application to the Court for the costs.

In *Sutton Harbour Co.* v. *Hitchens* (*a*) it was held that where a suit becomes unnecessary by reason of matters subsequent to its institution, the Court upon motion has jurisdiction to dismiss without costs, but cannot go into merits on a motion to dismiss, nor can it make the defendant pay the costs of a plaintiff where the bill is dismissed. In *Troward* v. *Attwood* (*b*) Lord *Romilly* decided that where, pending a suit, the matters in litigation are disposed of by an independent proceeding, the plaintiff may apply to the Court and stop the prosecution of the cause. The Court will then look at the record and the other facts, and dispose of the costs either by staying the suit with, or without, costs, or make such order as may be right. *Elsey* v. *Gawson* (*c*) follows *Troward* v. *Attwood.*

Judgment.

No case has been cited for the plaintiff which goes so far as to decide that a bill may be dismissed with costs to be paid by the defendant to the plaintiff.

The more recent authorities seem to shew that the question cannot be entertained at all on motion except by consent. Vice Chancellor *Knight Bruce*, in *Langham* v. *Great Northern Railway Co.* (*d*), where a motion was made by the plaintiff before answer to dismiss the bill the defendants paying the costs, on the ground that the suit had been occasioned by the

(*a*) 15 Beav. 161.
(*b*) 27 Beav. 85.
(*c*) 12 W. R. 586.
(*d*) 1 DeG. & Sm. 503.

1871.

Webb v. McArthur.

wrongful act of the defendants, and its object attained by the motion for an injunction, though considering there was justice and reason in the application, did not feel authorized to make such an order. In *Wylde* v. *Wylde* (*a*) Vice Chancellor *Wood* having made an order that the defendants who had satisfied the plaintiff's claim before the hearing, should pay the costs of the suit, an appeal was taken to the Lords Justices, who discharged the order. Lord Justice *Turner*, when giving judgment, said "the case of *Sivel* v. *Abraham* had been misunderstood. All that was there decided, was that a plaintiff might apply to the Court to stay proceedings and order the defendant to pay the costs of the suit, and that if the defendant made no objection, the suit might be disposed of in that manner."

Judgment.

The practice was stated by Vice Chancellor *Wood*, in *Morgan* v. *Great Eastern R. W. Co.* (*b*), thus:—"According to *Sivel* v. *Abraham* a plaintiff under these circumstances (*i. e.* defendant submitting to plaintiff's demand) is bound to make an application to the defendant to have the costs disposed of on motion, and unless he does so, is precluded from having the extra costs occasioned by going on to a hearing. But if the defendant refuses to allow the matter to be disposed of on motion *Wylde* v. *Wylde* decides that the case cannot be so dealt with." Here, as in the two cases last referred to the defendant does object to the question being disposed of on motion, so on the authority of these cases I cannot entertain the application.

As to the defendant's motion to dismiss with costs for want of prosecution, it is said in the affidavit of the plaintiffs' solicitor, that "the verdict having been obtained at law before the injunction could be disposed of, the motion was not proceeded with, and subsequently

(*a*) 10 W.R. 503. (*b*) 1 H. & M. 78.

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it was agreed between Mr. *McCarthy* (the defendant's solicitor) and myself that the matter should lie over until the proceedings at law were terminated." This is not contradicted, so I cannot say that the plaintiffs have been delaying the prosecution of the suit, unless the proceedings at law terminated at such a time as would have enabled the plaintiffs to go to a hearing last sittings. Now I find that judgment was given by the Court of Common Pleas, on the 11th of March last, and the Toronto sittings began on the 20th of that month. It was thus too late for the plaintiff to set the cause down, the 4th of March being the last day for that purpose. As the motion and the cross-motion should each be refused with costs, the proper course will be to set the costs of the one off against the costs of the other, and give no costs of either.

CONRON v. CLARKSON.

Executors.

Where an executor is appointed for a limited period or until the happening of some event, his power as such executor ceases with the occurrence of such contemplated event.

A testator by his will appointed his wife executrix, and gave her certain legacies, provided she remained single, and in the event of her marrying again, made other disposition of his estate, and appointed another person his executor. An assignment of a mortgage made by her and her husband after her second marriage was held to pass no interest.

[June, 1871.]

Statement.

This question arose on a reference as to title and priorities before the Referee, and the circumstances, as far as they are material to the principle laid down, appeared to be as follows :—

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Conron v. Clarkson.

A number of persons had been made parties as part owners of the equity of redemption and as subsequent incumbrancers. A question arose upon the claim of *Milton A. Thomas*, who sought to prove as derivative mortgagee of a mortgage made by one of the owners of the equity of redemption to *Robert Lowry*. The mortgage itself was dated in November, 1858, and the assignment of it by way of mortgage in May, 1861. The assignment was made between *Mary McLeod*, executrix and devisee, under the last will and testament of *Robert Lowry*, deceased, of the first part, *Milton A. Thomas* of the second part, and *Donald McLeod*, husband of *Mary McLeod*, of the third part; and by it *Mary McLeod*, "as executrix and devisee as aforesaid," assigned the mortgage to *Thomas*. His claim was opposed by the children of *Lowry* on several grounds.

Statement.

The testator by his will, after appointing his wife (now Mrs. *McLeod*), executrix, gave her the proceeds and benefit of all deeds, mortgages, and other documents in his possession, to be received and enjoyed by her during her natural life, provided she remained single; and, in the event of her forming a second marriage, he directed that all his estate, goods and chattels should be fairly valued, and that a third part of the whole should be paid by his executor, afterwards named, to his wife, on the youngest child attaining twenty-one. He then gave the rest of his property equally among his children, on the youngest attaining twenty-one; and he made provision for their education. He further, in the event of his wife marrying again, appointed his friend *George Graham*, to be sole executor of his will.

Before assigning the mortgage in question, Mrs. *Lowry* did marry again, as appeared from the assignment.

Mr. *Morphy*, for *Thomas* the claimant.

Mr. *Chadwick*, for other parties.

1871. MR. TAYLOR, REFEREE IN CHAMBERS.—Immediately upon her marriage Mrs. *McLeod's* power, as executrix, of dealing with the assets ceased.

Conron v. Clarkson.

That a testator may appoint a person to be his executor for a particular period of time only, or during the minority of his son or the widowhood of his wife, or until the death or marriage of his son, is well established, (*a*). In such a case, if the testator does not appoint a person to act before the period limited for the commencement of the office, or after the period limited for its expiration, administration may be committed to another person until there is an executor (*b*). but, here the testator did appoint another person, *George Graham*, and upon the wife's second marriage, the executorship at once passed to him.

Judgment.

In *Bond* v. *Faikerby* (*c*), a testator, *Faikerby*, appointed his wife *Dorcas*, executrix and residuary legatee for life, and after her death gave the residue to his sister for life, remainder to his two nieces, and by a codicil he made a stipulation, that in the event of his wife's second marriage, she was to concur in the appointment of trustees for the management of his property. The wife duly proved the will and afterwards married again, but died without any trustees having been appointed. By a settlement made before her second marriage she was empowered to make a will, which she did, appointing her second husband, one *Bond*, her executor. The sister of *Faikerby* died before her so that the neices thereupon became entitled immediately upon the death of *Dorcas*, and one of them obtained administration *de bonis non* to the goods of *Faikerby*. *Bond* moved the Court to have the grant revoked, and prayed administration himself, as the executor of *Dorcas*, the executrix of *Faikerby*. Upon the

(*a*) Pemberton v. Cony, Cro. Eliz. 164; Carte v. Carte, 3 Atk 180.
(*b*) Wentworth, Off. of Exor. 29. (*c*) Cas. temp. Lee 571.

application being made, Sir *George Lee* held that *Dorcas's* executorship expired on the marriage to *Bond*, and consequently that no priority continued to him from the first testator. 1871. Conron v. Clarkson.

No act of the Court granting the probate is in such a case necessary for the purpose of revoking it; indeed the probate granted to the first executor seems to enure to the benefit of the substituted executor. It has been held in several cases, that when one is appointed executor for a time, and another after that period, and the first proves the will, the second may act without probate (*a*).

These are old authorities, but I find no modern cases overruling them, and they are all cited in the last edition of *Williams* on Executors.

It is clear that *Thomas* acquired no interest under the assignment to him by Mrs. *McLeod* as executrix. She has, however, a beneficial interest in the estate of her first husband, and it may be that this instrument, though inoperative as an assignment of the mortgage, may be good as creating a charge upon her interest (*b*). But if it is so, effect cannot be given to it in this suit. The money payable under the mortgage is payable not to the beneficiary directly, but to *Graham* who is now the executor. What is the extent of Mrs. *McLeod's* interest in this mortgage cannot be ascertained here, an administration of Lowry's estate may be necessary for that purpose. Besides the provision made for her by the will is in lieu of dower, and, for anything that appears, she may have elected to take her dower. In which case she has no interest at all. Judgment.

(*a*) Anon, Ca. Chan. 265; Freeman's Rep., 385; 11 Vin. Ab. 56.
(*b*) Haynes v. Forsham, 17 Jur. 930.

1871.

REID v. STEPHENS.

Costs—Costs of defendants made parties in the Master's office severing in their defence.

The first part of General Order 315 applies to cases where several persons are acting in the same interest, and where costs are to be apportioned among them. It does not empower the Master to deprive any one of his entire costs where the decree gives costs generally. A surviving trustee, and the representatives of a deceased trustee, are not within the rule which prevents trustees severing in their defence at the risk of having but one set of costs between them.

[July, 1871.]

The question that arose in this matter was as to the costs of the executors of *George Michie*, made parties in the Master's office, and whether they should have a separate bill of costs from the party who was a party to the suit originally.

Statement.

The bill was by two creditors, viz., *Woodside*, and the creditor of the trust, to wind up the estate, with charges of mismanagement against *Woodside*, and seeking to charge him with loss occasioned to the estate. A consent decree had been made, with a reference to the Accountant, who held that the executors of *George Michie* were necessary parties.

The decree directed simply an account of the dealings of *Woodside* only.

Mr. *Bain*, for *Michie's* executors. These executors thought they had conflicting interests, and obtained different solicitors to represent them. The decree on further directions in terms gives costs to these executors as between solicitor and client; but the taxing officer refuses separate bills to *Woodside* and the executors. The rule that only one bill of costs should be allowed does not apply where a trustee and the

1871.

Reid v. Stephens.

representatives of a deceased trustee are defendants, it only applies to two trustees who are before the Court as *co*-trustees. If not co-trustees, separate bills of costs should be allowed. Although there was no actual conflict between the defendant *Woodside* and the executors of *Michie*, a conflict would have arisen on the accounts if the suit had not been compromised. There was a question as to commission in which their respective interests were adverse, and the commission was apportioned. By the decree the taxing officer is concluded. Section 315, General Orders, does not apply when the defendants are mentioned *nominatim* in the decree on further directions. The executors appeared by separate counsel at the hearing on further directions, and the question of costs was discussed at the hearing.

Mr. *Fleming*, for plaintiff. We were obliged by the Accountant's ruling to make these executors parties. It was objected, when the proceedings were in the Accountant's office, that these parties should have appeared by the same solicitor as Mr. *Woodside*, and Mr. *Woodside's* solicitor offered to act for them. No charge is made against the executors of Mr. *Michie's* estate (*a*). The decree does not say *how* the parties are to get costs, and it does not fetter the taxing officer in allowing a one-half bill.

Judgment.

MR. BOYD, MASTER IN ORDINARY.—Supposing the matter open upon the present decree, the question is, should the defendant *Woodside* and the defendants made parties in the Accountant's office, have, by the law of this Court, but one set of costs between them. The first part of General Order 315 seems to apply to a case where the costs of two or more defendants are to be apportioned among them in equal or unequal proportions, not to a case where one defendant is to be

(*a*) See Wightman v. Helliwell, 13 Grant, 330; Hughes v. Key, 20 Beav. 395.

1871.

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wholly deprived of costs. If the decree gives costs to the defendants, as here, *nominatim*, the Master can consider whether two or more of them should have defended together, and allow but one set of costs; but he can not wholly disallow costs to any one defendant, as that would be running counter to the terms of the decree. Now this is not a case for apportioning the costs. Charges of mismanagement were made against *Woodside*, which, according to the rule in *Shaw* v. *Johnson* (*a*), would have justified him in defending separately, even if the other defendants had been parties by bill. Again, this defendant substantially succeeds in the suit, something being found due to him, and he is allowed his costs by the decree. His solicitor offered to act for the other defendants, but they declined, and there was no power to compel them to accept. If they were wrong in not joining with *Woodside* in the Accountant's Office, then it was for the Court to have disallowed them costs *in toto*; but the Court has awarded them costs: see *Barry* v. *Woodham* (*b*), and *Kampf* v. *Jones* (*c*). But it cannot be said that these defendants, added after decree, were wrong in defending separately. They were the representatives of the deceased co-trustee of *Woodside*, the surviving trustee, and therefore not made parties in the same interest as *Woodside*. They are not within the well-known rule which prevents trustees from severing in their defence, and do not forfeit costs by retaining a separate solicitor in whom they have confidence: *Aldridge* v. *Westbrook* (*d*), *Reade* v. *Sparkes* (*e*). Moreover, no charges were made against them or the deceased trustee, and in this view they were justified in severing from the surviving trustee, against whom misconduct was charged. If these charges had been established, the Court would have deprived *Woodside* of *his* costs, and awarded full

Judgment.

(*a*) 9 W. R. 629.
(*b*) 1 Y. & C. Eq. Ex. 538.
(*c*) C. P. Coop. 18.
(*d*) 4 Beav. 212.
(*e*) 1 Moll. 10.

costs to the added defendants: *Webb* v. *Webb* (*a*), *Cummins* v. *Bromfield* (*b*). There is no possible ground for diminishing the costs of any of the defendants under General Order 315, and full costs will therefore be taxed to all parties.

1871.

Reid v. Stephens.

DAVIDSON v. BOOMER.

Leave to appeal after time expired.

The Court, although reluctant to shut out a party from the privilege of appealing, will not give leave to appeal after a long lapse of time, and where numerous sittings of the Court of Appeal have been held since the judgment.

[September, 1871.]

This was an application on the part of the defendant *Boomer* for leave to appeal after the time limited by the statute had expired.

Statement.

Mr. *S. H. Blake*, for applicant.

Mr. *J. Hoskin*, for infant parties.

Mr. *C. Moss*, for some of the respondents.

Mr. *A. C. Chadwick*, for other respondents.

The applicant desired to appeal from the decree pronounced herein, and also from the order of V. C. *Strong* made on an appeal from the Master's report, declaring the applicant not entitled to dower in the residue of the testator's real estate and from the decree on further directions, in so far as it declared that the legacies and annuities stand primarily charged upon the personal estate of the testator.

(*a*) 16 Sim. 55. (*b*) 3 Jur. N. S. 657.

1871.

Davidson v. Boomer.

Mr. *Hoskin*, for the parties interested in the real estate, contra, contended that no sufficient case was made as to the first grounds of appeal; two years delay had taken place since the decision, and no reason was given for not appealing at the time. If defendant had appealed promptly, the accounts would have been taken promptly.

Mr. *Chadwick* urged, that to grant leave under the present circumstances, would afford a bad precedent.

Mr. *Moss* referred to *Bullen* v. *Renwick* (*c*). Here the defendant felt aggrieved from the first, and knew the state of the accounts. She had attended the proceedings in the Master's office. The same accounts would not be necessary if the judgment was wrong. The defendant's contention is, that the legacies were charges on the real estate. Some seventy persons were added in the Master's office, who were interested in the personalty. This would be unnecessary if defendant was entitled to all the personalty; she should have appealed promptly.

Judgment.

SPRAGGE, C.—I am disposed to give leave to appeal on the second ground for the reasons which I gave when the matter was before me. There is no reason suggested, and I see none why the question should not be appealed upon a special case; and I give leave upon condition that the appellant will facilitate the appeal being argued at the next sitting of the Court.

The appeal upon the third point is a matter of right.

I think I ought not to allow an appeal from the judgment of February, 1868. I have already stated several difficulties that have occurred to me. Further, I find,

(*c*) 1 Cham. R. 204.

upon referring to the argument and the judgment, that the two prominent points argued are those upon which it is now desired to appeal, and a question upon the Statutes of Mortmain; the former being the more prominent of the two, and involving a much larger amount of property. I should have been very well pleased to have the points appealed; and feel almost a disinclination to refuse an appeal, especially as the proposed appeal is from a judgment of my own. But after so great a lapse of time, and the numerous sittings of the Court of Appeal, that have occurred since, and after what has been done under the judgment, I think I ought not to grant it. To do so, in such a case as this, would be making a dead letter of the limitation of the time for appealing.

1871.

Davidson v. Boomer.

Judgment.

The appellant is to pay the cost of the application.

RITCHIE v. GILBERT.

Leave to answer after time expired.

The Court is loth to debar a defendant from answering, when he shews he has a good defence on the merits, and that to refuse would or might amount to a denial of justice. Leave was granted to a defendant to answer under such circumstances even after considerable delay on his part, he being put on terms as to costs, going to hearing, and otherwise.

[September, 1871.]

This was an appeal from the Referee refusing to set aside a decree *pro confesso* and let the defendant in to answer.

Mr. *C. Moss*, for appeal.

Mr. *S. H. Blake*, for plaintiff, contra.

1871.

Ritchie v. Gilbert.

On the part of the defendant it was set up that the defendant had intended to answer, but had been induced not to do so by conversations with the plaintiff respecting a settlement. The decree had been filed in May. Decree taken in September. It was urged that no damage would accrue to the plaintiff by allowing the answer to be filed; but that irreparable injury might accrue to the defendant by refusing it.

Mr. *Blake*.—Plaintiff had referred defendant to his solicitor on the occasion of the alleged conversation, and his versions of what passed was corroborated by the affidavits of three witnesses. There was no room for misapprehension, no affidavits in contradiction of those of plaintiff, and defendant does not swear that he misunderstood the defendants.

Judgment.

THE CHANCELLOR.—I think the defendant should have been allowed to answer. I have to choose between what will be, if the defendant is right, a denial of his rights, and, on the other hand, the keeping of the plaintiff still in litigation. The latter need be only for a short time, as the sittings at Barrie, where the venue is laid, is on the 6th of October. I will therefore give the defendant the opportunity of sitting up and proving his defence, if he has any, upon proper terms. It is an indulgence, and he has been guilty of considerable delay. He must pay the costs of his application to the Referee in Chambers and of the appeal, and must undertake to go to a hearing at Barrie; and he is in the meantime not to interfere with the plaintiff's enjoyment of the property in question as settled by the decree which has been taken.

1871.

RE SHAVER.

Estates tail—Statute of Limitations—Infancy—Fraud—Constructive notice.

Before the passing of the Act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee, and gave up possession to the purchaser: *Held*, that the Statute of Limitations did not begin to run until the death of the grantor.

A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting Assurance of Estates Tail; the purchaser accepted the conveyance and paid the purchase money without seeing the will or having the title investigated; the eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase, without giving any notice of his title, or of the defect in the father's right to convey; the purchaser went into possession, and improved the premises, and had no notice of the defect in his title until after the death of the vendor: *Held*, that he was entitled to hold the property in equity against the issue in tail.

In such a case, constructive notice of the defect in the vendor's title is no bar to the purchaser's right to relief.

[May, 1871.]

Statement.

Appeal by a petitioner under the Act for Quieting Titles, from report of *Mr. Bergen*, the Master at Cornwall, refusing certificate of title.

The patentee was *Hannes Shaver*. He died in 1828, leaving *John H. Shaver* his eldest son and heir-at-law. On the 9th of July, 1844, *John H. Shaver* conveyed to one *Nicholas Brouse*. On the 22nd of July, 1845, *Nicholas Brouse* conveyed to *Jacob Brouse*. On the 21st of April, 1854, *Jacob Brouse* conveyed to *Samuel Shaver*, the petitioner's father; and on the same day *Samuel Shaver* conveyed to the plaintiff. The petitioner and his father had possession for upwards of twenty years, viz., since 1846.

The petitioner relied, in the first instance, on the title which these facts would establish.

1871.

Re Shaver.

The contestant, on the other hand, claimed under a will said to have been made by *Hannes Shaver*, dated 29th of July, 1820, whereby *Hannes* devised this property in the following terms: "I give, devise, and bequeath to my second son, *George Shaver*, the west half of lot No. 32, in front of the township of Matilda; also two horses, one cow, one heifer, two sheep, one waggon, one plough, one harrow, one bedstead, one featherbed, one sheet, one blanket, and one pillow; to the use and benefit of my son *George Shaver*, and and the heirs male of *the* body and bodies of *such second*, third, and all and every other son and sons lawfully begotten; and in default of such issue, to the use and behoof of such second, third, and all and every other son and sons of the said *George Shaver*, my son." This devisee was the contestant's father, and the contestant is his heir-at-law. The will was soon afterwards proved in the Surrogate Court, but was not filed there; nor was it registered in the registry office of the county.

Statement.

The petitioner contended, that the will was not sufficiently proved: that if valid, it devised to *George H. Shaver* the fee simple, and not an estate tail as the contestant claimed; and that if it did give an estate tail only, the contestant had by his conduct precluded himself from claiming the property against the petitioner; or against his father who had bought from *George H. Shaver*, in ignorance of the terms of the will, and on the assumption that *George H. Shaver* was entitled to the fee simple.

The Master found for the contestant, and the petitioner appealed against the Report.

On the appeal, Mr. *S. H. Blake* and Mr. *Bethune* appeared for the petitioner.

Mr. *Moss*, contra.

1871.

Re Shaver.

MOWAT, V. C.—I am of opinion that the evidence was on the whole sufficient to justify the Master's conclusion that the will had been duly executed. The devise in question is very inaccurately expressed, but I am clear that it gave to the devisee an estate tail only.

Nicholas Brouse, to whom the heir conveyed, is dead. *Jacob Brouse* was examined as a witness and stated, that *Nicholas* purchased twenty-five acres of the lot from *George Shaver*, and afterwards the whole one hundred from *John H. Shaver*, and *Jacob* stated, that he himself purchased twenty-five acres from *Nicholas*, and the remaining seventy-five from *George Shaver*. The evidence affords no explanation of this seeming inconsistency. *Nicholas*, alone, conveyed to *Jacob;* and he did so by two deeds of the same date (22nd July, 1845), one of twenty-five acres with covenants, and one of seventy-five acres without covenants.

Judgment.

The petitioner and his father have made depositions stating, among other things, that in 1846 they purchased fifty acres of the lot from *Jacob Brouse*, and the other fifty acres from *George Shaver*. *George Shaver* alone executed any conveyance at that time, and this conveyance was of the whole lot, and contains covenants for title. This deed was registered on the 25th of August, 1853. The deed from *Jacob Brouse* was given to *Samuel* the petitioner's father, in the following year.

As to the petitioner's claim under the Statute of Limitations, if I am to assume that *George Shaver* was in possession of the one hundred acres when he conveyed to the petitioner's father, and that he then gave up to him possession of the whole, the cases in 12 C. B. (*a*) shew, that the Statute did not begin to run against the contestant until his father died, which is said to have

(*a*) Cannon v. Kennington, p. 1; Kennington v. Cannon, p. 18.

1871. Re Shaver. been about the year 1862; that "though there is a difficulty in understanding why in principle such a distinction should exist," still the Statute did make a distinction between a case where a tenant in tail should voluntarily abandon his interest during his life and remain out of possession for twenty years, and a case where he should convey his interest and thereby put it out of his power to make an entry or bring an action; that in the former case the issue was barred; and that in the latter (which is the present) case, time was not to run against the issue until the death of the tenant in tail. The conveyance by *George Shaver* was executed shortly before the disentailing Act came into force.

There is some evidence that *John* went into possession of part of the lot before he conveyed to *Nicholas Brouse*, and built a house on it; but when *John* did so, or how long he remained in possession, does not appear; and it seems to be conceded that *George* had possession of the whole lot when he conveyed to the petitioner's father. If that was not so, it should be made distinctly to appear.

Judgment.

The petitioner further contends, that the contestant cannot set up a title under the will, as he was a party or privy to the sale in 1846; that he did not then, nor for many years afterwards, nor until the petitioner had made valuable improvements pretend to have any title to the lot; that he received part of the purchase money; that he acquiesced in, adopted and confirmed the sale; and that after so long a possession by the petitioner, the contestant is not entitled to disturb him (*a*). There is some evidence in support of these allegations: and I am not prepared to say that the answer made to them by the learned counsel for the contestant relieves his case from difficulty. It was suggested that this part of the peti-

(*a*) See Kerr on Frauds, 81 to 86; Sug. 743, &c.

tioner's case took the contestant by surprise; and I think that under all the circumstances he is entitled to a further opportunity of meeting it. I shall therefore refer the matter back to the Master for further inquiry; and, having reference to the provisions of the Act for Quieting Titles, and to the nature and circumstances of the whole case, I shall not limit the further inquiry to this part of the case, but shall leave it discretionary with the Master to go beyond it, if he sees fit on any application to him for that purpose. The order will therefore be in general terms, further to inquire into the respective claims of the parties. I reserve the costs. 1871. Re Shaver.

After the making of the report which was the subject of the above appeal Judge *Pringle* succeeded Mr. *Bergen* as Master at Cornwall; and the new evidence having been taken by Judge *Pringle*, he made a report in favor of the petitioner. From this report the contestant appealed. Statement.

The following is the Master's note of the grounds on which his judgment proceeded:—

"I came to the conclusion on the evidence that the contestant was not of age when the deed was executed by his father, but was in his twentieth or twenty-first year; that he had been informed before the sale that a will had been made by his grandfather, and knew that he had an interest in the land under that will, though he had not seen the document; that he knew his father's intention to sell to the petitioner's father; that he was present with his father and mother and the petitioner's father when the deed from his father and mother to petitioner's father was being drawn up, with full knowledge of the intention of his father and mother to execute it; that he was not present when the deed was

1871. signed, but was in a blacksmith's shop on the other side of the road, a few yards from the store where the deeds were executed; that after the deeds were executed, he went home with his father, and mother and the petitioner's father, who had the deed then in his possession; that he did not on either occasion object to the sale or conveyance; that at least on one occasion before the completion of the sale, and on several occasions afterwards, he expressed his satisfaction at the arrangement to parties not interested; that he never notified petitioner or his father of the existence of the will, and that he did not for several years after his father's death take any step to recover the property.

Re Shaver.

"I based my report on the contestant's knowledge that there was a will giving him an interest in the land, and on the belief I formed from the evidence that he was not only satisfied with the sale, but wished it to be carried into effect; and that he led the petitioner's father to believe that he (contestant) was satisfied with the arrangement; and I took the view also that contestant had been extremely negligent in asserting his right to the property, and had by his delay encouraged the petitioner to improve it to a large extent.

Statement.

"I put more confidence in the evidence of petitioner's father that contestant had urged him to purchase, than I do in contestant's denial of that statement. My impression from the whole of the evidence is, that contestant before and at the time of the sale was anxious that it should be made; and that he urged petitioner's father to buy; and that he was satisfied after the sale, and said so to several persons; and that it was not until several years afterwards that he thought of asserting any right he might have to the property. In short, I formed the opinion that contestant's conduct was a fraud on the petitioner.

"I am quite satisfied that when petitioner's father bought, he paid the value of the property, and that if acquiesence on the part of the contestant would make petitioner's title good, there was sufficient evidence of it." 1871. Re Shaver.

Mr. *James McLennan*, for the appeal.

Mr. *S. H. Blake*, contra.

MOWAT, V. C.—I think that the Master's view of the facts is justified by the evidence, except perhaps as to the age of the contestant. On that point the evidence is conflicting; and, the onus being on the contestant, I would have desired more exact evidence than he has given. Was no record of his birth made by the clergyman by whom the contestant states that he was baptized? and no record of his baptism? Did no one see the entry in the family record, which the contestant says was burnt? His mother has not been examined, the excuse given for the omission being that, according to the uncorroborated statement of the contestant himself, she was dangerously ill on the 22nd March, when one of the contestant's own depositions was being taken. Judgment.

I have no doubt whatever that *Samuel Shaver*, who bought the lot in March, 1846, made his purchase in good faith, and paid the full value of the property; that the transaction was as between the parties to it perfectly valid; and that the pretence of there having been fraud or undue influence on the part of the purchaser is utterly groundless.

The deed from the contestant's father was in a printed form, containing absolute covenants for title, as was usual at that period; and was filled up by a shop clerk of *Jacob Brouse*. No professional man was consulted, and no investigation of the title was made. The purchaser had heard of the will; he had not seen it or

1871. taken advice upon it; and he did not know that the contest-
Re Shaver. ant took any interest under it; he supposed and assumed that it gave the property to the contestant's father, *George H. Shaver*, absolutely; and he bought on that assumption, without having taken any step to verify it. This looseness too often occurs among persons of the class to which these parties belong, and was much more common twenty-five years ago than it is now.

The heir of the patentee had previously conveyed the property to *Nicholas Brouse*, and *Nicholas* had conveyed it to *Jacob Brouse*. At the time of the transaction with the petitioner's father, *Jacob* was in possession of either 25 acres or 50—it does not clearly appear which. He had no deed or writing from *George H. Shaver;* but it appears that before this time he had paid *George* something by way of consideration for any interest which *George* had in fifty acres of the property.
Judgment. *Jacob Brouse* also seems to have been a party to the sale to the petitioner's father: and it was agreed that the latter should pay half his purchase money to *Brouse* and the other half only to *George H. Shaver*. The amount going to *George H. Shaver* was paid at once, and the latter executed to the petitioner's father the deed in question, which is expressed to be for the whole hundred acres. The purchaser and his son (the petitioner) entered into possession the same year. The purchase had been made for the petitioner; he paid part of the money which *Jacob Brouse* was to receive; and, after *Jacob* had released his interest to *Samuel*, the latter conveyed the property to the petitioner, who has remained in possession up to the present time. The petitioner from time to time improved the property, and to a considerable extent, without any notice from the contestant until some years after the contestant's father died. The contestant said that on one occasion before his father's death he did speak to the petitioner about the will, and referred to his own interest under it. But

the petitioner, in his evidence, denied the conversation, and the Master gave credit to the denial. 1871.

Re Shaver.

At the time of the sale to the petitioner's father, the contestant was living with the seller, his father, on the lot in question; he knew of the negotiations for the sale; he was anxious that the sale should be effected; he personally and repeatedly urged the petitioner's father to buy; he afterwards came in with his father and mother to have the sale carried out, and he was entirely satisfied with it in all respects. He is stated in the evidence to have been an active man in his father's affairs, and to have been the more intelligent of the two; though the father was quite intelligent enough to make a valid bargain; and it seems to have been in part at the son's instance that the sale was determined upon, and was afterwards carried out. I think, on the whole, that I must regard the son as in fact a party to the sale.

Judgment.

He was aware of the will, and had before this been told of his interest under it. His evidence is in part this: "I heard from Mr. *James Fraser* that the place was entailed, before *Samuel Shaver* bought—years before. *James Fraser* said to me when my father sold twenty-five acres to *Nicholas Brouse*, 'If the old man sells the land from under you, some day it will all come back to you.' The contestant said nothing of this to the purchaser, *Samuel Shaver*, though he knew that the purchase was being made on the assumption that the will gave his (the contestant's) father an absolute title to the property.

I may further state, that I see no reason for supposing that the sale was not a provident one for the interest of both the father and the son.

After the sale, the contestant removed with his father to the property received from the purchaser in part

1871.

Re Shaver.

payment; and the contestant continued—with the exception of a very short interval—to live on this land from that time until his remaining interest in it was sold; the proceeds of the sale the contestant received for his own use.

The petition was filed in September, 1869. The plaintiff had then been in possession twenty-three years. As respects so much of the lot as *Geo. H. Shaver* was in possession of when he executed the conveyance to the petitioner's father, time did not run against the contestant until his father's death; but as to so much of it as *Jacob Brouse* was then in possession of—viz., 25 or 50 acres—the time had commenced to run at law, and the petitioner, I apprehend, has, by virtue of the Statute of Limitations, acquired the legal title as well as the equitable.

Judgment.

The question is, as to the petitioner having a right in equity to the remainder of the lot as against the contestant?

There would be no room for argument on the part of the contestant but for two circumstances: (1) that he wanted (according to his own account) six months of being of age when the transaction occurred; and (2) that, as *George H. Shaver's* title to the lot was under the will of his father, and the purchaser had (as was contended) constructive notice (*a*) of the circumstance that, by the true construction of the will, the seller had an estate tail only in the property. (The Act for enabling tenants in tail to bar the entail by conveyance did not pass for six weeks afterwards). But for these two circumstances it is clear that the contestant's endeavoring to induce the purchaser to buy from the father, and the contestant's allowing the transaction to be completed without giving information as to his interest under the will,

(*a*) See the cases Dart, V. & P. 787 to 790.

would bind him in equity. "The law of this Court," as was said by the Vice-Chancellor, in *Davies* v. *Davies* (*a*), "binds any person who is present upon the occasion of a transaction when money is paid upon the faith of a representation which that person understands; and this Court compels a person who saw money paid on the faith of a representation, to fulfil the purpose for which that representation was made, if it was made with her privity and the money was paid in her presence. Upon that principle, *Mary Davies*," a tenant in common, was there held bound in equity, she "knowing the money was paid in respect of a contract for the sale of all the shares, and knowing that she had one of the shares." The same principle has been frequently stated and acted upon; and the authorities seem to shew that the two circumstances referred to as distinguishing the present case are not sufficient to do so.

Judgment.

On that point, I may refer first to the case of *Watts* v. *Cresswell* (*b*). There a tenant for life had borrowed money on property of which the lender thought that the borrower was owner in fee. The remainderman was the mortgagor's son; he was about twenty years of age at the time; and he had at his father's instance solicited the loan for him, and he had not given notice of his own title. The defendant, in his answer, stated that at the time of the transaction, "he had heard the lands were settled upon him after his father's death, but had never seen the settlement." Lord *Cowper* held him liable for the mortgage. Sir *John Leach*, in *Cory* v. *Gertchen* (*c*), cited this case with approval, observing that it was "a very strong case, for the young man did not know, but had only heard of the settlement under which his title arose."

(*a*) 6 Jur. N. S. 1320. See Brydges v. Branfil, 2 Sim. 384.

(*b*) 2 Eq. Ca. Abr. 515, pl. 3.

(*c*) 2 Madd, 366.

1871.

Re Shaver.

Savage v. *Foster* (*a*) was cited to me on the argument. That case related to property which the owner had settled on her first marriage. The defendant was a *feme covert*, and was entitled under this settlement to the remainder after the death of her mother, the settlor. On the marriage of a younger daughter, the mother conveyed this property to the intended husband, subject to her own life estate, and without notice to him of the settlement. This was done with the defendant's knowledge and concurrence, though she was no party to the conveyance. The Lord Chancellor held that she was bound to give effect to the conveyance. The exposition which Lord *Macclesfield* gave of the law on this occasion has often since been quoted with approbation. He said: "Now when anything in order to a purchase is publicly transacted, and a third person, knowing thereof and of his own right to the lands intended to be purchased, doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase—for it was an apparent fraud in him not to give notice of his title to the intended purchaser; and in such case infancy or coverture shall be no excuse: for, though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *feme coverts*, which every person who contracts with them is presumed to know, and if they do not take such conveyances as are necessary they are to be blamed for their own carelessness when they act with their eyes open; yet, when their right is secret, and not known to the purchaser, but to themselves or to such others who will not give the purchaser notice of such right; for that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or *feme covert* should be active in promoting the purchase,

Judgment.

(*a*) 9 Mod. 35.

if it appears that they were so privy to it that it could not be done without their knowledge." 1871.

Re Shaver.

In *Hobbs* v. *Norton* (*a*) the issue in tail under a settlement encouraged a stranger to purchase from a younger brother an annuity given to the younger brother by his father's will, and was therefore held bound by it, notwithstanding the settlement and the absence of fraud. The intending purchaser, before buying, had gone to the party entitled under the settlement as heir, "and desired to know of him if his younger brother had a good title to it (the annuity), and whether his father was seized in fee at the time. Sir *George Norton* (the heir) told him he believed his brother had a good title to it, and that he had paid him this annuity these twenty years; but, withal, told him that he heard there was a settlement made of his father's lands before the will, and that the said settlement was in Sir *Timothy Baldwin's* hands, and that he had never seen it, and therefore could not tell him what the contents of it were, but encouraged him to proceed in his purchase, telling him he had not only paid his brother his annuity at that time, but had paid to his sisters three thousand pounds under the same will. Afterwards Sir *George Norton* gets this settlement into his hands, and would avoid this annuity, the lands being thereby entailed. *Hobb's* bill was to have this annuity decreed or repayment of his purchase money. The cause coming on to be heard, there was no proof that Sir *George Norton*, at the time he encouraged *Hobbs* to proceed in this purchase, had any notice of this settlement." But the "Lord Keeper decreed the payment of the annuity, purely on the encouragement Sir *George* gave *Hobbs* to proceed in his purchase, and that it was a negligent thing in him not to inform himself of his own title, that thereby he might have informed the purchaser of it, when he came to enquire

Judgment.

(*a*) 1 Vern. 186.

1871. of him, and therefore decreed Sir *George* to confirm the annuity to *Hobbs*."

Re Shaver.

Nicholson v. *Hooper* (*a*) was before Lord *Cottenham*. There the owner of chattels had pledged them to a broker to secure advances made by the broker. The broker afterwards, in his own name, and without the knowledge of the owner, repledged the same chattels to the defendants by way of mortgage. For the plaintiff it was contended, that the broker could not pledge the chattels so as to bind the owner, and that the defendants had constructive notice that the chattels were not the broker's property. But the Lord Chancellor held both these points to be immaterial, because the plaintiff, when informed of the transaction with defendants, or until long afterwards, did not inform them of his intention to dispute it. His Lordship observed, amongst other things, that "a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction." I refer to this case as indicating (in common with the cases previously cited) that, in the application of this principle, constructive notice of the defect in the seller's title is not material.

Judgment.

Boyd v. *Belton* (*b*) appears to shew the same thing. The principal facts of that case were these: A judgment had been recovered against the owner of two estates, one of them being a leasehold and the other a freehold. On the death of the owner, the leasehold became vested in one person, and the freehold in another; and it was assumed by the court that if the purchaser, who had the freehold, had paid the judgment, he would have been entitled to be recouped out of the leasehold. But, on a treaty for the mortgage of the leasehold, the owner of

(*a*) 4 M. & C. 179. (*b*) 1 J. & La. 730.

the freehold had been in communcation with the mortgagee on the subject of the mortgage, and did not inform him of his equitable claim to be recouped. The omission was not fraudulent, and seemed to have arisen from his not being aware of his right to be recouped. The mortgagee was aware of the judgment, and of its not having been paid; but it was held that, having allowed the mortgage to be taken without giving notice of his equitable claim, he could not afterwards set it up against the mortgagee. Lord *St. Leonards* considered that his "silence amounted to a disclaimer of any interest in the property which was about to be mortgaged." His Lordship did not consider the mortgagee's notice of the judgment to be material, because the other was treating the debt as his own, and was negotiating with the creditor for time to pay it off. The parties dealt on "a common understanding" with respect to the judgment; and though this common understanding was a mistake, the mortgagee was held entitled to insist that the defendant should set up no equitable claim inconsistent with it.

1871.

Re Shaver.

Judgment.

Thompson v. *Simpson* (*a*) was cited to me, and is to the same effect. There, lands were limited to a father for life, with power to appoint amongst his children; and in default of appointment, the property was to go to his children as tenants in common in fee. The father and his eldest son joined in a fine and recovery; and they erroneously supposed that this vested the fee in the father. Afterwards the father sold and conveyed the estate, the son being present, but not being a party to the conveyance. Lord *St. Leonards* held that the son's interest was bound.

Leary v. *Rose* was a case before the present Chancellor (*b*), and appears to be a direct authority for the

(*a*) 2 J. & L. 110.

(*b*) 10 Gr. 346. See also Savage v. Foster, 9 Mod. 36; and cases cited, Dart. on Vendors, 4th ed., p. 769, note (*e*).

1871.

Re Fhaver.

petitioner on all points. There a will had been made devising property to the testator's widow; but, the will not having been properly executed, the testator's heir at law was entitled to the property. Before he became of age, his mother and he, treating the mother as owner under the will, contracted verbally for the sale of the property; and he was a witness to the conveyance which his mother executed to the purchaser. There was no fact in regard to the title which the heir knew and the purchaser did not know; and the purchase was not made "upon the faith of any fact represented or concealed" by the heir. The Chancellor held that the case fell within the principle of *Thompson* v. *Simpson*; and that the circumstance of the heir being a few months under age was not sufficient to distinguish it. On that circumstance the judgment has the following observations: "Where a contract is made upon the faith of assumed facts, an infant knowing the contrary, but yet assenting to the existence of the facts, the infant is guilty of a moral wrong, for he ought to disclose them; but he may intend no fraud at the time, and may never commit any actual fraud, for his latent rights may be asserted by the representatives of his estate; yet if they are asserted afterwards, they are held bound. Does not the fraud then consist, not in the original standing by when the contract was made, but in the assertion of the right after so standing by?"

Judgment.

In holding constructive notice of the will to be insufficient to deprive a purchaser of his equity in such a case, the person standing by is dealt with as a vendor himself is dealt with where the conveyance obtained from him was defective and left the estate wholly or in part unconveyed; or where the vendor's title was defective and the vendor subsequently acquired the title even for value. In such cases he is bound to execute a new conveyance, vesting in the purchaser, his heirs or assigns, the unconveyed estate, or the estate newly acquired; and

constructive notice of the defect is no bar to this equity (*a*). 1871.

Re Shaver.

At the time of the transaction now in question, there was no machinery in Ontario for barring an estate tail; and if the attention of the purchaser had been called to the fact that the will did not give to the vendor an absolute title, or even that there was a question about it, and that the contestant considered or had been told that by the will his father could sell a life estate only, the purchase would probably have been deferred, or not have taken place at all.

The inalienability of estates tail is entirely opposed to the spirit of a free people; and the want of machinery for alienating such estates was temporary only. Such machinery existed, I apprehend, until the abolition of real actions in 1834; and at the time of the transaction in question, the bill was probably before the Canadian Par liament, which was passed into law on the 18th May-1846, enabling the alienation to be effected by a simple conveyance. It has always been the rule in England, that a tenant in tail who contracts to sell or charge the fee simple may be compelled to do whatever is necessary to give the purchaser a good title to the fee simple (*b*). And the contestant's father could have been compelled in this country at any time after the 18th May, 1846, until his death, sixteen years afterwards, to execute a new conveyance, which would have perfected the petitioner's title (*c*). But for the contestant's long silence, the petitioner might have taken advice and availed himself of this right to a new deed. The contestant's silence also led to the petitioner's making improvements from time to time on the property, thereby greatly increasing

Judgment.

(*a*) See Cases *supra*. (*b*) See Sug. V. & P. pp. 205, 468, 14th ed.

(*c*) See Smith v. Baker, 1 Y. & C. C. C. 223; Osborne v. Smith, 4 Ir. Ch. 58: and other cases cited Sug. 744 *et seq.*; Dart., 4th ed. 740 *et seq.*

1871. its value. I think that the contestant's silence was a disclaimer of his right, and an acquiescence in the petitioner's title to the fee simple. There is in the contestant's favor no moral equity which should incline the Court to take a different view. He comes to take advantage of an accident, which but for his own silence when the purchase was made, and until after his father's death, would not have been open to him. I think that he must give effect to the "common understanding" upon which, with his knowledge and concurrence, the purchase was made from his father.

Re Shaver.

I think that a certificate of title should issue, declaring the plaintiff to be entitled in fee legally and equitably to twenty-five acres of the land, and equitably only to the residue; and declaring that the legal estate in the latter is in the contestant, and that he is a trustee thereof for the petitioner.

Judgment.

The petitioner having failed on the first reference—of which, and of the appeal from the Master's report thereon, I reserved the costs; and having succeeded on the second reference only, there should be no costs to either party.

ARTHUR v. BROWN.

Security for costs—Waiver.

Security for costs will not be ordered to be given where a defendant has obtained further time to answer.

[May, 1871.]

Mr. *Smart* applied for an order for security for costs under circumstances which would have entitled him to security but for any question of waiver.

Mr. *Arnold*, contra, objected that any right to security for costs had been waived by the defendant asking and obtaining further time to answer. 1871. Arthur v. Brown.

The REFEREE.—That seems to be clear: *Atkins* v. *Cook* (*a*), *Swanzy* v. *Swanzy* (*b*), *Chapin* v. *Clarke* (*c*).

Application refused.

RE BELL.—BELL V. BELL.

Administration order.

Where on an application for an administration order the fact of the defendant being administrator is not disputed, and the plaintiff has filed an affidavit that he is administrator, it is not necessary to give further evidence of the fact, or to produce the letters of administration, or a copy thereof.

[May, 1871.]

Mr. *Foster*, for the plaintiff.

Mr. *Bethune*, for the defendant.

MOWAT, V. C.—This was an application for an administration order by one of the next of kin. For the defendant, the administrator, it was objected that the plaintiff must produce the letters of administration, or an exemplification; and reference was made to *Foster* v. *Marshall* (*d*) in support of the objection. In that case the report says that a like application was refused by the present Chancellor, "there not being any evidence produced, proving that letters of administration had been granted to her." On looking at the Chancellor's book, I find that the motion stood over, not for the letters of Judgment.

(*a*) 3 Drew. 694.
(*b*) 4, K. & J., 237.
(*c*) Unreported case before V. C. Esten.
(*d*) 1 Cham. R. 29.

1871. administration, or for primary evidence of them, to be procured by the applicants, but merely for an *affidavit* shewing *Elizabeth Marshall* to be administratrix. The book shews that, on the motion coming on again, the plaintiff produced an official certification of the grant of the letters; but, curiously enough, the order when drawn up did not mention this evidence, but mentions only the plaintiff's affidavit.

Re Bell.

I see no possible reason for requiring a plaintiff to go to this expense. If he had filed a bill, and the defendant by his answer had admitted having obtained letters of administration, or if the bill had been taken *pro confesso* against him, no further evidence of the letters would have been required. On a motion of this kind, I think, that, where the point is not disputed, and the plaintiff has filed an affidavit that the defendant is administrator, nothing further need be required. If the defendant had been executor instead of administrator, I see some object in requiring the production of the will, or sufficient evidence of it, as the Court has to look at its terms before formally disposing of the case; and therefore I do not wish my present decision to be regarded as disturbing the practice which is said to have prevailed in such cases; but, in the absence of authority, I cannot unnecessarily sanction the wholly useless expense which permitting an administrator to raise this objection imposes on a plaintiff.

Judgment.

——— v. CORCORAN.

Service out of jurisdiction.

The Court will not order service by publication of parties out of the jurisdiction who cannot be found on the affidavit of the plaintiff alone.

[May 25th, 1871.]

In this case, some of the defendants living out of the jurisdiction under circumstances which would have enti-

tled the plaintiff to proceed against them by publication, an order was moved for on the affidavit of the plaintiff alone. 1871.

v.
Corcoran.

THE REFEREE refused to grant the order on the grounds that the Court had held that it was neeessary the plaintiff should furnish other material than his own affidavit.

McLennan, *Henderson*, and *Downey*, plaintiff's solicitors.

SCOTT v. BURNHAM.

Technical objection—Notice, where an error or slip is apparent on the face of it—Second application—Leave to renew motion.

Where a party seeks to set aside a proceeding on technical grounds, his own case will be judged *strictissime juris*; and if he moves on insufficient materials, he does so at his own risk, and the Court will not aid him.

The Court will not encourage the taking advantage of an error which is obviously a mere slip and does not mislead, and is not calculated to mislead.

Where a notice of hearing had been given, and by a mistake of the month it was for a day past, the Court allowed it to stand, putting the parties on terms as to costs, and changing the venue for the convenience of going to hearing.

Where such notice had been moved against before the Referee, and the affidavits failed to negative the receipt of any other notice, and the motion consequently was refused, but leave was given to renew it; *Held*, that the giving time to renew the motion was an unwise exercise of discretion, and that it was open to the Judge on appeal to ignore or reverse it.

[November, 1871.]

A motion was made before the Referee to set aside the notice of examination and hearing, and to strike the cause out of the list of causes set down for hearing at Peterborough, on the ground that the day mentioned in

Statement.

1871. the notice for the hearing was a day past, as the word "October" had been used instead of "November." This motion was refused by the Referee on an objection that the notice served was not proved, but leave was given to renew it, as the failure was on technical grounds. A subsequent application was made on a new affidavit by the defendant, which shewed the notice of hearing to have been served on Monday, and negatived the service on his solicitor or his codefendant of any other notice, without stating how he knew the fact. This application was granted, and from the order setting aside the notice the plaintiff appealed.

Scott v. Burnham.

Mr. *Foster*, for the plaintiff, contended that the failure of the first application was a bar to the second, as the Court will not entertain a second application upon grounds which might and ought to have been brought forward upon the first. At law, the authorities are clear and uniform (*a*), *Tilt* v. *Dickson* (*b*), *Leggo* v. *Young* (*c*), *Orchard* v. *Mopey* (*d*). If leave to renew had been given by the Referee, it was an improper exercise of discretion, and it was open to him to question it, the strict rules of appeal not applying to the appeals from the Referee, at least in mere matters of practice.

THE CHANCELLOR.—Is the present appeal an appeal from such ruling, that is the giving leave to renew the application, and is it so stated in the notice?

Judgment.

Mr. *Foster*.—I object to the order made, and this leave was part of it, for without the giving leave there would have been no second order. The leave, if given, was *ex parte*, and an appeal does not lie from an *ex parte* order. Had the first order reserved leave to renew, I

(*a*) Queen v. M. & L. R. Co., 8 A.d. & E. 413; Queen v. Inhabitants of Barton, 9 Dow. P. C. 1021.

(*b*) 4 C. B. 786. (*c*) 17 C. B. 549. (*d*) 2 E. & B. 206.

should have appealed against it. Mr. *Foster* then went on to contend that defendant had waived his right to object to the irregularity of the notice by his laches. The case of *City of Toronto* v. *McGill* (*a*); proceeded upon the analogy of cases at law which had since been overruled: *Stevenson* v. *Hodder* (*b*) was not an authority in the case of a notice of examination and hearing. The rule of law is, that mere slips will not be favoured where not calculated to mislead: *Harrison*, C. L. P. Act 677, Notes; *DeBlaquiere* v. *Cottle* (*c*). The order now appealed from was not supported by proper material, the affidavit being defective in not shewing means of knowledge. The Court would not conjecture circumstances in favor of applicant, who should support his case by the best and fullest evidence: *Leslie* v. *Foley* (*d*).

1871.

Scott v. Burnham.

Mr. *J. Hoskin*, contra, in support of the order, read the affidavits on which it had been granted, in one paragraph of which the defendant swore that neither he nor his solicitor had been served with any other notice than the one complained of as irregular.

Judgment

THE CHANCELLOR.—How can he state that? He is alleging what he can know nothing of; and I shall treat his affidavit as worthless on that point. Indeed, I may say, the motion before the Referee was of a description I regret to see in this Court. The mistake in the notice was an obvious one, and whether bound by law to return the notice or not, the defendant ought as a matter of propriety to have drawn the attention of the other side to it.

Mr. *Hoskin*.—The suit is a hostile one, and we stand on our strict rights.

(*a*) 1 Cham. R. 16.
(*b*) 15 Grant 570.
(*c*) 4 Prac. R. 167.
(*d*) 4 Prac. R. 246.

1871.

Scott v. Burnham.

THE CHANCELLOR.—I do not reflect on you. I understand that you are merely counsel, and acting under instructions.

Mr. *Hoskin* proceeded to argue that the order was not open to the objection urged of its being a second motion on the same subject matter. The first motion was not disposed of on the merits, and leave was given to renew it on better material.

THE CHANCELLOR.—I do not think the learned Referee should have given leave to renew; but can the question of his having done so be argued now?

Mr. *Hoskin*.—I contend it cannot. There is nothing said of it in the notice, and I confine myself to the grounds of appeal stated. The original motion was a meritorious one; the rules of Court are useless unless enforced. Had we appeared at the hearing and asked for costs, and been called on to produce this notice, we should have failed. That is the proper test by which to judge of the correctness of the order.

Judgment.

THE CHANCELLOR.—Your solicitor may have had a correct notice; there is nothing to negative such a fact. The affidavit of the defendant I treat as nothing.

Mr. *Foster*, in reply: The absence of any objection to the leave to renew from the grounds of appeal was occasioned by the fact that neither in the first nor in the second order did anything appear shewing leave. Even had it been otherwise, it has been held that it was not necessary to state the grounds of appeal in the notice of appeal from Chamber motions before the Referee. It would be unwise to graft the strict rules of appeal on the details of every day practice.

THE CHANCELLOR.—I am very much disinclined to give effect to objections such as that made here; so much so,

that I may possibly sometimes run counter to decided cases; but in this case I am inclined to think the learned Referee wrong on two points, which I have already indicated in the course of the argument. The first, that there was no evidence before him negativing service of a good notice on the solicitor. The affidavit of the party who makes the allegation that no service was made on the solicitor, I take as worthless, as he speaks of what he evidently can know nothing of. The other point I refer to is, that the learned Referee was wrong in giving leave to renew the former motion, if I can consider that point now, and I incline to think I can. Without such leave the second application must certainly have failed, and it would have been a wise exercise of discretion, in my opinion, to refuse such leave, the application being in every sense *strictissime juris;* and if a party moves on insufficient material he must take the consequences.

1871.

Scott v. Burnham.

On the following day the CHANCELLOR gave judgment as follows:

Judgment.

SPRAGGE, C.—Judgment was virtually given at the close of the case. I think the Referee should not have given leave to renew the motion after its failure upon the first application. It was an indulgence which I think should not have been granted upon an application which was *strictissime juris*, and in which there were no merits. I think also there is no evidence negativing the service upon the defendant's solicitor of a regular and proper notice of hearing. The order setting aside the notice, and striking the cause off the list is rescinded. No costs to either party. Plaintiff may carry cause to hearing at Cobourg. Venue to be changed accordingly.

1871.

RAE v. GEDDES.

Master's office—Vendor and purchaser—Infants—Direction under Chancery Act to convey—Interest.

Nothwithstanding that a decree declares that the defendant "has accepted the title of the plaintiff," the defendant has a right to objecto a conveyance by the plaintiff alone if it appears that the legal estate is partly out of him.

Where it had been referred to the Master "to settle the conveyance or conveyances to the purchaser or purchasers, and all proper parties are to join therein, as the Master shall direct," and the Master did not, in settling the conveyance, direct that an infant, whose lands had been sold, should be made a party, but merely that her guardian should; and subsequently, after such infant had married, directed that she, being still an infant, and her husband should join in a new conveyance, which was done; it was held that this was within the Master's powers, and was in effect as if the Court had directed the execution of the conveyance under 12 Vic. ch. 72, and that the deed was binding and passed the estate.

Interest on purchase money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession, and a difficulty respecting the conveyance may justify his not taking possession.

[November, 1871.]

Statement. Mr. *Downey*, for the plaintiff, contended that the language of the decree declaring that the plaintiff's title was accepted precluded the defendants from asking a conveyance from the *Heberts*; also, that the legal estate in Mrs. *Hebert* had been conveyed by her by a deed settled by the Master at Hamilton, dated 20th of October, 1870.

Mr. *Edward Martin*, for the defendants, contra, cited *Warren* v. *Richardson* (*a*), Practice on Settling Conveyances (*b*), *Denny* v. *Hancock* (*c*), *Jumpson* v. *Pitchers* (*d*), *Paramore* v. *Grenslade* (*e*); and argued, that when the order in *Re Hunter* was made, Mrs.

(*a*) 1 Younge, pp, 1, 6, 8.
(*b*) 2 Danl. 1162, 1186.
(*c*) L. R. 6 Ch. 13.
(*d*) 1 Coll. 13.
(*e*) 17 Jur. 1064.

1871.

Rae v. Geddes.

Hebert was an infant and unmarried; that she is still an infant, and was married after the sale and before the conveyance; that no order of revivor has been taken out after her marriage, no change has been made in the style of the cause, and no proceedings had since been had in the Masters office (*a*); that the Master was *functus officio* when he settled the first conveyance from the guardian, when once he has settled a conveyance his powers cease, he can do no more unless it is referred back to him.

Again, that the deed is invalid under 12 Victoria, chapter 72, because there is no direction that it should be signed by the infant or some person specially ordered to sign it. The marriage being a subsequent disability there should have been a fresh order. The execution by the infant *sua sponte* is invalid unless it is done under an order directing the execution by the infant. Secs. 50–53 Chancery Act, Consol. Statutes Upper Canada, ch. 12, shew that there must be an order on the infant; and he also objected that the vendor claimed interest from the date of the contract, while the purchaser contended it should run only from the date of the conveyance or from the time the purchaser took possession.

Mr. *Downey* referred to the Chancery Act (*b*), pointing out that the new conveyance was under Consolidated Statute, and the first conveyance under 12 Victoria before consolidation. As to the interest he claimed interest from the date of acceptance of the contract. *Wills* v. *Beavan* (*c*), *Wills* v. *Maxwell* (*d*), *Carrodus* v. *Sharpe* (*e*), (on the question of interest) were also cited in the course of the argument.

Judgment.

MR. BOYD, MASTER IN ORDINARY.—1. Notwithstanding the form of the decree herein declaring that

(*a*) See *Re Hunter*, 14 Grant, 680.
(*b*) Con Stat. U. C. ch. 12, secs. 50-54.
(*c*) 22 Beav. 551; (*d*) 32 Beav. 550. (*e*) 20 Beav. 56.

1871.

Rae v. Geddes.

the defendant "has accepted the title of the plaintiff" the defendant has the right to object to a conveyance by the plaintiff alone if it appears that the legal estate is partly out of him. This question arises upon settling the conveyance before the Master, and is not concluded against the defendant because of his acceptance of the title (*a*).

2. This being so, it is contended by the defendant that the legal estate is not all in the plaintiff, and that Mrs. *Hebert*, an infant and married woman, is a necessary party with her husband to the conveyance. The points relied on are (1), that she is one of the infants whose land was ordered to be sold in *Re Hunter* by order of 11th March, 1853, and no specific order was made or direction given by the Court that she should execute any deed under the provisions of 12 Vic. c. 72; (2) that the Master, at Hamilton, in settling the first conveyance under the said order, did not make this infant a party thereto, but merely the guardian, and that nothing passed by that deed, and there was no power in the Master to settle another conveyance thereafter; (3) that if the Master had power to settle a second conveyance, he could not do so several years after the order had been made, and after a second disability had passed upon this infant by her marriage; and that at all events the Master could not do so, unless the proceedings to sell were revived after her marriage, which was not done. The plaintiff relies on the fact that a second conveyance was settled by the Master, and executed by Mr. and Mrs. *Hebert* on the 1st day of October, 1870, and asserts that this perfected the estate in him. Complicated questions of a merely technical character are thus presented for decision, which a simple order of confirmation *nunc pro tunc* would have avoided. This, however, has not been obtained, and the parties stand upon their strict rights.

Judgment.

(*a*) Warren v. Richardson, 1 Younge 1; Denny v. Hancock, L. R. 6 Ch. 9 note.

1871.

Rae v. Geddes.

As to the first objection, the order of March, 1853, refers it to the Master "to settle the conveyance or conveyances to the purchaser or purchasers, and all proper parties are to join therein as the Master shall direct." It is to be noted that this language is almost identical with that of the General Order No. 10 of the 17th January, 1851, then in force, and conferring like powers upon the Master in all cases. This General Order had the force of a statute, and was doubtless passed to avoid the necessity of such an application to the Court as was made in *O'Lone* v. *O'Lone* (*a*). By 12 Vic. ch. 72, secs. 1, 2, 3, it is said that "the Court may order the infant to convey the estate as the Court thinks proper," and that "where the Court deems it convenient that a conveyance should be executed by some person in the place of the infant, the Court may direct some other person in the place of the infant to convey the estate;" and it is provided that "every such conveyance, whether executed by the infant or some other person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time." Now I think it is a sufficient compliance with these provisions for the Court to refer it to the Master to settle who shall be parties to the conveyance, and to say, as is done here, that the parties when so ascertained are to join therein. There was power to do this under the General Orders then in force, and the maxim, *Id certum est*, &c., will surely apply to such a case. If the Master under this order had settled a conveyance to which the infants were parties, and they executed it, I think it impossible to say that they did not do so under the order, and by the direction of the Court. This objection I overrule.

Judgment.

As to the next objection, it is conceded that the infants should have been parties to the first deed, but

(*a*) 2 Grant 642.

1871.

Rae v. Geddes.

they were not; the Master sought to rectify this afterwards, and I think he could properly do so under the order in question. Assuming there had been numerous infants living in different parts of the world, I suppose it could not be doubted but that the Master would have power (as a mere matter of jurisdiction, to settle several conveyances for execution by the infants severally in the different quarters where they lived. Settling one conveyance to which one of these many was a party would surely not render him *functus officio* as to the rest in the case put. What essential difference is there in the present case? The mere lapse of time would not disable the Master, if he had not carried out all the provisions of the order, and disposed of everything referred. As to one point of reference, it is well known that the Master can make a separate report; he can afterwards complete the matters referred by a subsequent report. What more has in effect been done here? No report was made in this case upon the first conveyance setting forth that the Master had settled a conveyance pursuant to the order. Had that been done, it would have strengthened the defendant's argument; but, till the Master did make such a report, he was not, strictly speaking, *functus officio* as to this matter referred. This is shewn from the fact that if a person wishes to appeal from the Master's settling of a conveyance, the proper course is for the Master to report, and then the appeal lies in the usual way: *Lloyd* v. *Griffith* (*a*), *Wakeman* v. *Rutland* (*b*), *Trust and Loan Co.* v. *Monk* (*c*), where this practice was followed (*d*).

Judgment

As to the last objection, it may have been irregular in proceeding without something being filed to shew the marriage of the infant (for an order of revisor was

(*a*) 1 Dick 108 S. C., subsequently 3 Atk. 264.
(*b*) 8 Ves. 504. (*c*) 14 Grant 385.
(*d*) Dan. Prac. (1880) Vol. II. Pt. 1, pp. 900, 901; 1 T. & Ven. 422.

not necessary), but any irregularity of this kind will not affect the substance of the transaction, which was this, that the Master indicated Mrs. *Hebert* as a proper person to convey, and in pursuance thereof and of the order of March, 1853, she did convey, her husband also joining with her. Now, the question is, did the estate pass from her thereby? The Married Woman's Act had been complied with; and though the deed of an infant, it was not a nullity, the estate passed out of her to the grantee—under ordinary circumstances, subject to avoidance afterwards: *Slator* v. *Brady* (*a*). But, can the present deed be rendered invalid by any subsequent action or disavowal of the infant? Clearly not, I think. It was an execution in substantial compliance with the directions of the Court and Master; and even granting any irregularity to exist, the Court would not allow the infant to recede from such an act taken in a proceeding instituted by the infant for her benefit and the fruits of which she has enjoyed. I had doubts upon the question, not argued before me, whether the Court could deal with the estates of infants who were *femes coverts;* but these have been resolved by cases upon the analagous statute of 7 Ann. ch. 19, from which much of the language of our statute as to the sale of infants' estates has been borrowed. Thus the case in *Comyn's* R. p. 615, contains the opinion of that able Judge that the English Act extended to all infants, married or not, and this opinion was acted upon in *ex parte Wain* (*b*). The Court there directed that the usual formalities of conveyance requisite in the case of a married woman should be complied with (*c*), and these formalities have been observed in the case now in hand. This deed is clearly binding upon the husband: *Carr* v. *Carr* (*d*). And I think it is equally clear that this conveyance is operative as to the infant wife,

1871.

Rae v. Geddes.

Judgment.

(*a*) 14 Ir. C. L. R. 66.
(*b*) 3 Atk. 479.
(*c*) See Billing v. Webb 12 Jur. 427.
(*d*) 15 Beav. 227.

1871. Rae v. Geddes.

and that the Court will hold her to it: *Blackie* v. *Clark*, (*a*) *Field* v. *Morne* (*b*), ——— v. *Handcock* (*c*) *McDougall* v. *Bell* (*d*). Upon the whole I must hold that the entire legal estate is in Dr. *Rae*, and that the defendant, in taking the conveyance I am settling, from the plaintiff as sole grantee, is as safe as it is possible for the Court of Chancery to make him.

This is putting the case in the strongest possible way for the defendant. The case of *Jumpson* v. *Pitcher* (*e*) shews that the infant was really a trustee of the legal estate, and that her subsequent marriage would not interfere with the power the Court had of compelling her to convey.

3. It remains to settle the dispute as to the time from which interest shall begin to run upon the purchase money.

Judgment.

In *De Visme* v. *De Visme* (*f*), the rule approved of by Lord *Cottenham*, in cases where nothing is said about interest is this: that interest is payable upon the purchase money from the time the contract ought to be performed. He says: "If the abstract shewed a good title, then the property would belong to the purchaser from the time at which the contract ought to be completed, and the money would be the money of the vendors, and the one would be entitled to the fruits of the property and the other to the fruits of the money." The facts here are that the title was accepted by the defendant by his letter of the 28th December, 1869; that is evidently the conclusion of the Vice Chancellor, which I willingly adopt (*g*). The difficulty as to conveyancing which subsequently arose was soon obviated by

(*a*) 15 Beav. 605.
(*b*) 19 Beav. 180.
(*c*) 17 Ves. 383.
(*d*) 10 Grant 283.
(*e*) 1 Coll. 13.
(*f*) 1 Mac. & G. 346.
(*g*) See 18 Gr. 217.

1871.

Rae v. Geddes.

the plaintiff procuring conveyances from the parties in whom the legal estate was, so that I cannot assume any additional delay would have arisen on this score, if the defendant had been willing to complete the transaction when he accepted the title. The whole difficulty between the parties arose from the *Hebert* conveyance; and my finding upon this is, that the defendant was wrong. Interest will therefore run from the date when after the acceptance of the title the defendant could have safely taken possession. The later cases shew that even until a question of conveyancing is settled, the purchaser may be justified in not taking possession: *Wells* v. *Maxwell* (*a*), *Denny* v. *Hancock* (*b*). I think he was warranted in the present case in requiring that the legal estate should be got in from the heirs at law of Dr. *Hunter*, and that interest should run from the time when the vendor would have got this in, if required to do so immediately after the acceptance of the title. The subsequent correspondence shews that the point was first mooted by the defendant in his letter of 9th September, 1870; the requisite conveyances were procured by the vendor, and the last of them furnished to the purchaser on 31st October thereafter—an interval of (say) two months. Add then a period of two months to the date of acceptance of title, and that will make the interest to run from (say) 1st March, 1870. Under the circumstances, I rather think that the purchaser would have acted prudently in not taking possession till he was certain that he could get a proper conveyance, and that could not be given till the legal estate in *Hunter's* heirs-at-law would be vested in the plaintiff.

Judgment.

(*a*) 32 Beav. 350.

(*b*) L. R. 6 Ch. 13.

1871.

WADDELL v. SMYTH.

Master's office—Evidence.

The Court will not interfere with the discretion of the Master in deciding on the relative veracity of witnesses, where evidence has been taken *viva voce* before him.

Where the Master refused to open a case where the evidence was closed, on the ground that the applicant had not made such a case as entitled him to a new trial at law; the Court sustained his ruling.

[COURT, February 1, 1871.]

There had been an appeal from the former Master in this case, and an order had been made directing him to take evidence in respect of a certain letter or agreement alleged to contain terms under which the item sought to be established was chargeable. The agreement was witnessed by two parties, and plaintiff had examined only one of them. The plaintiff swore to the letter being in the handwriting of defendant, at whose instance plaintiff had signed it; the defendant denied it. The Master thought the evidence failed to sustain it, and reported against the plaintiff. From this the plaintiff appealed.

Statement.

Mr. *Cooper*, for the appeal.

Mr. *Cattanach*, contra.

Mr. *Cooper* contended that the Master had laid down too rigid a rule in insisting that the plaintiff should make such a case as would entitle him to a new trial at law. Much more lenity had been usually given in the Master's office, even perhaps to too great an extent; but it would be dangerous to adopt so stringent a rule as that laid down. Here the evidence sought to be introduced was that of the other subscribing witness, not of witnesses generally, in which case it would, perhaps, not have been unreasonable to exclude it.

1871.

Waddell v. Smyth.

STRONG, V. C., remarked that the Court would not interfere with the judgment of the Master on questions of fact depending on the veracity of witnesses. It was sometimes done in England under the old practice of exceptions to the Master's report, but the English decisions on such a point did not apply here as in England, the evidence was not taken *viva voce* before the Master, but on interrogatories. A strong case is required even where the evidence is taken before a jury, who may be ignorant men and misunderstand the evidence; but when the Master, a skilled officer of the Court, has had the benefit of seeing and hearing the witnesses, the Court will not interfere. As to the rule laid down by the Master that to open a case, and let in new evidence, the applicant must make such a case as would entitle him to a new trial. I consider the rule to be a very good one, and hope the Master will act up to it, except in very exceptionable cases. The appeal must be dismissed with costs.

Judgment.

Appeal dismissed.

GILBERT v. BRAITHWAIT.

Jurisdiction.

This Court has no jurisdiction in a case involving a less sum than £10.

Where the Referee dismissed a bill on the ground that the amount involved was only $24, his order was sustained by the Court in rehearing term.

[REHEARING TERM, 11th December, 1871.]

This was a motion before the Court in rehearing term to set aside an order of the Referee, who had dismissed the plaintiff's bill, on the ground that the amount in dispute, $24, was too small, and the suit too trifling to be entertained by the Court.

1871.

Gilbert v. Braithwait.

Mr. *T. Moss*, for the plaintiff, contended, 1st, that the plaintiff would be without remedy if the bill could not be sustained—no remedy existed in the Division Court, see pages 144 and 145 Con. Stat. U. C.; sec. 56 of the statute extends the jurisdiction beyond the right to recover a mere money demand, but with this exception the Act applies to mere money demands. Here then is a charge on the land created by agreement between the parties in terms, which excluded any other of personal claim, and to avail himself of this charge the plaintiff sought the intervention of this Court. 2nd. Previous to the passing of the Law Reform Act (*a*), this case would have been entertained on the Equity side of the County Court (*b*). No limitation is created there as to the amount, that is, the smallness of the amount; the law gives a right to recover any sum under $200 however small,—this Act is repealed by the Law Reform Act (*c*). Section 2 of same Act provides for a tariff to apply to such cases when brought in this Court. The effect of these enactments is to transfer from County Courts the equitable jurisdiction in such cases to this Court. In England, prior to Lord *Bacon's* order, it had been the custom to discourage litigation for small amounts. Lord *Bacon's* order, which in reality introduced no new principle, was then passed; but it was soon departed from, and never treated as an inflexible rule. Where any right existed, or a charge of fraud was made, or a case was very complicated, the rule was held not to apply, and was repeatedly departed from (*d*). In *Beckitt* v. *Hillboro* (*e*), the jurisdiction was maintained, although the amount in dispute was only £9, and from the language of the Vice Chancellor in that case, it is plain he considered there was a jurisdiction, with a discretion in the Court to refuse a plaintiff costs although

Argument.

(*a*) 32 Vic. c. 6, Ont.
(*b*) see County Court Act, sub-sec. 6 of sec. 4.
(*c*) sec. 4, sub-sec. 1.
(*d*) see Beam's Orders p. 53.
(*e*) 8 Hare, 188.

1871.

Gilbert v. Braithwait.

relief decreed when the amount was small and the case trifling. Here the plaintiff was entitled to a specific performance, the Court might in its discretion refuse him costs: this was the utmost penalty. In England the present practice is to entertain cases under £10 where the circumstances are special, that practice is under an order of Court. Mr. *Spence*, in his books, says that apart from the order of Lord *Bacon*, no inflexible rule has been laid down. It should also be borne in mind that when such rule was made, the relief granted by the Court was looked an as a matter of indulgence, and not of right: here it is a right—an absolute right, and the Court is bound to listen to a suitor however small his claim. They have no right to refuse him relief on account of the amount of his claim, but may make him pay costs, or refuse him his costs if his claim is trifling; here there is a wrong, and the party wronged has a right to a remedy—the Court in this country is a creature of Statute, and the Statute Law has given a plaintiff this right—the minor equitable jurisdiction formerly vested in the County Court is now by statute vested in this Court, and the plaintiff has a right to evoke that jurisdiction. Here, too, there are special circumstances in *Westbrooke* v. *Browett* (a) where such a bill, it is said, was refused, the claim was a mere money demand, and the Division Court could entertain it.

Argument.

Mr. *Milloy*, for defendant, referred to *Beam's* Orders and *Morgan's* Chancery Acts and Orders 378; Order 9; Con. Orders; *Story's* Equity Pleadings, secs. 500, 501, 502, cases referred to in note in *Redfield's* Edition. All these authorities go to shew that even where no remedy exists elsewhere, in a case of this amount the bill will be dismissed or a demurrer allowed. As to the contention that the equitable jurisdiction of the County Court has been transferred to this

(a) 17 Grant, 337.

1871. Gilbert v. Braithwait.

Court, that jurisdiction was at best a portion of the jurisdiction of this Court vested by the County Court Act; and when that Act was repealed the jurisdiction reverted back, and is now simply whatever it was previous to the County Court Act; that Act created no new jurisdiction, but only transferred part of the jurisdiction of this Court, neither did the Law Reform Act create any new jurisdiction when it repealed that Act, but left the practice whatever it was at the time of the passing of the County Court Act. Referring to *Beckitt* v. *Hillboro* (*a*), the reason given for entertaining that bill, although the amount was small, is that the plaintiff was justified in expecting a larger sum. It is plain from all the cases that the Court was never intended to be a forum for cases of this kind, and they should be discouraged (*b*). The axiom that for every wrong, there is a remedy, is subject to exceptions. He also took the ground that the dismissal of the bill was an exercise of discretion, and in such a case there was no appeal.

Judgment.

STRONG, V. C.—The question involved in this appeal is as to the right of the plaintiff, who claims to have a charge upon land for the sum of $24.79, to have this charge raised by a sale under the decree of this Court in the usual manner in default of payment. On an application made in Chambers by the defendant, the Referee, proceeding on the authority of *Westbrooke* v. *Browett* (*c*), dismissed the bill, on the ground that Lord *Bacon's* ordinance of the 9th January, 1618, applies here, and that this Court will not entertain jurisdiction of a suit, the object of which is to compel the payment of less than £10. The expression used in the order is, "shall not take jurisdiction *in suits under the value of* £10." This ordinance is still considered as regulating the practice of the English Court of Chancery, and was of course

(*a*) 8 Hare 188. (*b*) see Snell's Equity 13.
(*c*) 17 Grant 837.

1871.

Gilbert v. Braithwait.

acted upon in England at the time this Court was established by the Act of Upper Canada, 7 Wm. IV. ch. 2. That Act gives to this Court in the cases enumerated "the like jurisdiction and powers" as were at at the time it was passed possessed by the Court of Chancery in England.

It seems clear, therefore, that this Court was originally under the Act of 1837 as much bound by the order referred to as was the English Court of Chancery.

Mr. *Moss*, however, argued that the Statute conferring equity jurisdiction upon the County Courts included this class of cases where the demand was for less than £10, and that the Law Reform Act of 1858 (32 Victoria cap. 7) transferred the jurisdiction so conferred on the County Courts to this Court. The Statute 85 Vic. cap. 119, which confers equity jurisdiction upon the County Courts, enacts that "those Courts shall possess the like jurisdiction and authority in respect of the matters hereinafter mentioned as are possessed by the Court of Chancery." This rule, therefore, must also have applied to the County Courts. But this is immaterial, as the Law Reform Act 32 Victoria cap. 6. section 4. repeals the provisions of the Consolidated Statute which embodies the Act 16 Victoria, cap. 118, so that the jurisdiction of this Court now depends in all cases similar to the present on the Statute of 1837, as carried into the Consolidated Statues. This removes the only doubt I had at the close of the argument. And being of opinion that we are bound by the Statute, and can exercise no discretion, I concur in the judgment of the the Chancellor in *Westbrooke* v. *Browett*, and agree that this appeal must be dismissed with costs.

Judgment.

1871.

WALKER v. NILES.

Staying proceedings pending rehearing.

The Court will not, as a matter of course, stay proceedings pending a rehearing. It is in the discretion of the Court to stay, or refuse to stay, proceedings; and the Court will impose terms according to the circumstances of each case, granting a stay more readily than formerly, if it be shewn that there is a danger of loss unless proceedings be stayed.

Where in an interpleader suit a large sum of money was ordered to be paid over to a claimant resident in the United States, and the plaintiff who purposed to rehear, and had made his deposit, asked to have proceedings stayed; the claimant was directed to give security to abide by any order the Court might make upon the rehearing, and to repay the money if so directed, before the money was ordered to be paid to him.

[November, 1871.]

The interpleader issue directed in this suit, between the plaintiff and one *Doolittle*, had been tried and decided in favor of the latter. An application had been made for a new trial which had been refused, and *Doolittle* had obtained the usual order for repayment by the plaintiff to him of the sheriff's fees, poundage, and expenses; for payment out of Court of the money paid in by the sheriff as the proceeds of the sale of the goods claimed, and for the costs of the interpleader order and the trial of the issue. The plaintiff who proposed to rehear the order refusing a new trial, and had made the necessary deposit, and set the cause down for this purpose, now moved to have all proceedings stayed pending the rehearing.

Mr. *J. H. Macdonald*, for the plaintiff.

Mr. *C. Moss*, for the claimant *Doolittle*.

Judgment. MR. TAYLOR, REFEREE IN CHAMBERS.—Rehearing an order does not of itself stay proceedings under it, but it is in the discretion of the Court to grant a stay

1871.

Walker v. Niles.

of proceedings on an application for that purpose being made. At one time the Court was exceedingly unwilling to grant such applications, and would never stay proceedings, unless it was shewn that irreparable injury would otherwise be done. The modern authorities seem, however, in favor of a more liberal exercise of the discretion of the Court.

In *Moneypenny* v. *Moneypenny* (*a*) money was paid out of Court, pending an appeal, but only upon security being given for repayment in the event of the decree being reversed by the House of Lords; and a similar order was made in *Ralli* v. *The Universal Marine Assurance Company* (*b*). In *McIntosh* v. *The Great Western Rail Road Company* (*c*), where the decree directed the defendants to pay to the plaintiff a large sum of money, on an application to stay proceedings pending an appeal, the Court ordered the money to be paid into Court or security to be given. In none of these cases does there appear to have been even suggested any danger of the money being lost, if paid over pursuant to the decree appealed from.

Judgment.

In *Gibbs* v. *Daniel* (*d*), where it was alleged that the plaintiff was in indigent circumstances, but the evidence on this point was contradictory, the solicitor was required to give his personal undertaking to repay the costs, or give security for their repayment, and in default of his doing so, payment into Court was ordered.

Walburn v. *Ingilby* (*e*), was cited as an authority against the application being granted, and certainly some of the language there used by Lord *Brougham* is very much in favor of the respondent, but that very case was

(*a*) 8 W. R. 430.
(*b*) 10 W. R. 327.
(*c*) 13 W. R. 1029.
(*d*) 9 Jur. N. S. 632; 4 Giff. 41.
(*e*) 1 M. & K. 84.

1871. held an authority in support of such an application as the present, by Lord *Truro*. His Lordship in *Swift* v. *Grazebrook* (*a*) said, "the case of *Walburn* v. *Ingilby* appeared to be in favor of the present application, for in that case the motion was refused on the ground that no irreparable injury would ensue from non-interference; that the inference therefore to be drawn from that case was that if irreparable mischief had been substantiated the operation of the decree would have been suspended pending the appeal."

Walker v. Niles.

The question here then is, what danger is there of the money being lost, if paid over to the claimant. Two things it is said have always to be considered on such an application as the present: the amount at stake, and the chance if it should be wrongfully paid, of getting it back again (*b*). In the present case, the money in Court and the costs, must in the aggregate amount to a considerable sum, and the person entitled to receive it is a resident in the United States, out of the jurisdiction of the Court, so that if the money is paid over to him without security being given, the Court has no means of enforcing repayment in the event of the order being reversed on rehearing, and the issue ultimately decided against him. This seems to me such a case of danger as would justify the Court's interfering to protect the fund pending an appeal.

Judgment.

I think the proper course will be to permit the claimant to proceed to tax his costs and ascertain the amount payable to him, and that upon his giving security to abide by any order the Court may make upon the rehearing, and to repay the money if so ordered, the money in Court should be paid to him; and plaintiff should pay the amount which may be ascertained as due from him, and in default of the claimant giving such security

(*a*) 3 M. & G. 7. (*b*) Lord v. Colvin, 1 Dr. & Sm. 475.

that the money should be paid into Court to abide further order. 1871.

Walker v. Niles.

The plaintiff must pay the costs of this application (*a*).

STOVEL v. COLES.

Next friend.

The test of the solvency of a next friend is, whether he is worth £100 over and above what will pay his just debts. If the allegation to such effect is uncontradicted, or the fact established by evidence, it is sufficient.

When on a motion to change a next friend on the grounds of insolvency, the next friend's own cross-examination shewed him worth the necessary amount, and no evidence to the contrary was adduced, the motion was refused with costs.

[June, 1871.]

This was a motion on the part of the defendant that a new next friend be appointed, on the ground that the present next friend was insolvent. The next friend had been cross-examined on his affidavit, and had given evidence as to his circumstances; and it was contended that he had placed a high estimate on his property; that the defendants were very numerous, and should have additional security for costs; and that the Court or Judge in Chambers had a discretion to settle the amount of security to be given, no amount being stated in the order as a limit.

Mr. *Fitzgerald*, for the defendant *Howland*.

Mr. *Bain*, for the plaintiff.

MR. TAYLOR, REFEREE IN CHAMBERS.—The argument that there are here a large number of defendants so that the costs of the suit will be heavy, and Judgment.

(*a*) Gibb v. Daniel, 4 Giff. 41; Lamb v. Eames, 23 L. J. N. S. 185.

1871. Stovel v. Coles.

that as General Order 321 does not limit the amount for which security for costs is to be given, as the corresponding Order in England does, but leaves it to be settled on the application for security, so the defendants here should have more than the ordinary security for their costs, is entirely beside the question. This is not an application for security for costs.

When the next friend of a married woman is objected to, because not a person of substance, the defendant's cannot move for security for costs. The proper motion in such a case is for an order that all proceedings be stayed until the next friend be changed or security for costs given. This latter alteration seems to be inserted in the order for the benefit of the married woman, and in order that she may not be wholly prevented from asserting her rights in the event of her being unable to find another person willing to allow the use of his name.

Judgment.

The motion here is in proper form; and the only question I have to consider is, whether the next friend is solvent or not; that is, whether he is worth £100 over and above what will pay all his just debts. A long series of decisions seem to have settled this as the test of solvency for a next friend; and I do not feel at liberty, nor do I feel inclined, to make any alteration.

The defendant relies entirely on the evidence of the next friend himself and that shews, that excluding even the money he has in hand, his book debts and the property at Oakville, and even after making such a deduction as the defendant's solicitor would seek to have made when he says the next friend values everything fifty per cent. higher than other people would do, he is still worth more than double the amount necessary. I refuse the application with costs.

1871.

RE MCCONNELL.

Infants—Next friend.

In the case of an infant plaintiff the Court will not require security for costs, or remove a next friend because he is not a person of substance.

A motion to remove a next friend of an infant, on the ground that, during the progress of the suit, he had become insolvent, was refused with costs.

Where a solicitor had been appointed by the Master to represent certain creditors as a class, and one of such creditors, in an affidavit filed by him, repudiated the act of such solicitor: *Held*, he was bound by the solicitor's proceedings.

Held, further, that the solicitor was not only authorized to act for such creditors in the proceedings in the Master's office, but also in proceedings arising out of or connected with these,—such, for instance, as a motion in Chambers on their behalf.

[June, 1871.]

Mr. *Cassels* moved for the removal of the next friend of an infant, or for an order for security for costs, under the circumstances appearing in the head-note and judgment.

Mr. *Bain*, contra.

MR. TAYLOR, REFEREE IN CHANCERY.—I must refuse this application. The plaintiff is an infant, and the Court would not when the suit was instituted have removed the next friend, or required security for costs because he was not a person of substance. At one time this may have been doubtful, but it is now the settled practice of the Court (*a*). That being the case I do not see how I can remove him or require security now, on the ground that during the progress of the suit he has become insolvent. Judgment

The staying of proceedings until some interlocutory costs are paid, which is asked by the notice of motion,

(*a*) Davenport v. Davenport, 1 S. & S. 101; Fellows v. Barrett, 1 Keen 119; Murrell v. Clapham, 8 Sim. 74; Hind v. Whittmore, 2 K. & J. 458.

1871. cannot be granted. A decree has been made for an account and administration of the estate.

Re McConnell.

Creditors have come in and proved claims, and the Master in the exercise of the power conferred upon him by General Order 212, has committed the prosecution of the decree to the creditors who have proved. They are now the plaintiffs in fact, and the former plaintiff, at present at all events, stands in the position of a defendant. To stay proceedings on the application of those creditors who are thus in the position of plaintiffs would be like granting a plaintiff an order that he should not prosecute his suit until a defendant who has made a default in paying costs has paid them. The Stat. 29–30 Vic. ch. 42, sec. 4, does not assist the application in any way, as it simply provides for security being given, or proceedings stayed on the application of a defendant who has obtained an order for costs against a plaintiff.

Judgment.

On the argument of the motion it was contended that the next friend should be removed because he has not properly attended to the interests of the infant, and has an adverse interest. This ground is not taken by the notice of motion, but it is unnecessary for me to consider whether the applicants can raise it under the general words used in the notice of motion "on grounds disclosed in affidavits filed," because, from a perusal of the affidavits filed on both sides, I do not think such misconduct is made out so clearly as would justify my making an order for his removal.

So much of the notice as asks the appointment of *Holland* as the new next friend, was abandoned on the argument of the motion.

The motion must be refused with costs. I have had some difficulty in disposing of these, owing to the words of General Order 218. The solicitor who moves has been

appointed by the motion, under that order, to represent the creditors as a class, and he receives the notice of motion "on behalf of the creditors who have proved their claims." It was objected that he represents these creditors only on proceedings before the Master, and cannot make any application to the Court in Chambers on their behalf. The order in its terms applies only to proceedings before the Master, but I think it should be held to extend to any proceedings issuing out of or connected with these. An application was made in this matter on the 19th of November last, on behalf of the creditors by the same solicitor and an order granted on it. One of the creditors has filed an affidavit repudiating the present action of the solicitor, and saying that the motion is made without his authority. The creditor does not appear to have availed himself of the privilege he has under General Order 218 of being represented in the Master's office by a separate solicitor of his own, at least he does not say he has done so. I must assume that the creditors who have proved have acquiesced in the Master's appointment of the solicitor now moving, and he must be regarded as their solicitor, and they are bound by his proceedings, including liability for costs. The motion will be refused with costs, any costs payable to the next friend to be set off against the cost due from him under the order of the 19th of November last.

1871.

Re McConell.

Judgment.

1871.

Re Mason, an Infant.

Investing funds of infant—Sanction of Court.

A petition had been presented for the sale of an infant's estate, fifty acres of lands, which produced $700 and upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the Court, on which it seemed to be intended the father of the infant—a farm laborer—was to reside with the infant; the Referee refused to sanction the sale.

The circumstances under which such sanction would be given considered.

[November 15, 1871.]

Mr. *John Hoskin*, for the petitioner.

A petition had been presented praying a sale of fifty acres of land which had descended to the infant as heir of his mother. The petition also prayed that the money to be realized from such sale should be applied in the purchase of other lands. The evidence then adduced was considered sufficient to warrant a sale, and the land was sold accordingly, but no order was made as to the disposal of the purchase money. The amount realized after deducting the costs and taxes in arrear was $700 and upwards, of which $700 was outstanding at six per cent., on a mortgage given by the purchaser, and the balance was in Court.

The father of the infant, who is his guardian, had entered into a conditional contract to purchase for the infant a suitable piece of ground, and the sanction of the Court to such an investment of the money was now sought.

Judgment. Mr. Taylor, Referee in Chambers.—It seems somewhat doubtful whether the Court can make such a disposition of the infant's money as is now asked. Several cases can be found where land has been bought for infants under the sanction of the Court; but all the

cases seem to be cases where infants owning considerable estates, adjoining estates the possession of which would materially enhance the value of their other property, have been bought (*a*). However, it is unnecessary to consider what jurisdiction the Court possesses on a proper case being made for its exercise, for I am by no means satified that such a disposition of the infant's money as is here proposed would be for his benefit. 1871. Re Mason.

The principle upon which the Court acts, was thus stated by the late V. C. *Esten*, in *Re McDonald* (*b*):— "The interest of the infants, however, is the only thing that this Court can consider, and in making the inquiries which I am about to direct, the Master must bear this fact in mind, namely, that he is not to consider the present comfort of the family so much as the ultimate good of the infants." Here there is really no evidence that the contemplated purchase would be for the infant's ultimate benefit. The neighbours say that the property is worth the sum proposed to be paid for it, and that the investment "would be a good and profitable one." The father says that it would be a good and judicious investment, and would enable him, with the aid of his own labour, to provide for the infant a much larger annual revenue than would be derived from the interest on the mortgage, and would be otherwise to his advantage. Now from a statement in the petition that the father is "poor and unable by his own unaided efforts to properly maintain and educate the infant," but of which there is no evidence, I presume that the intention is, that the father shall in the meantime occupy and work the property proposed to be purchased, and apply the annual profits towards the maintenance of the child. No case is made for any such arrangement. Generally Judgment.

(*a*) Ashburton v. Ashburton, 6 Ves. 6; Webb v. Lord Shaftesbury, 6 Mad. 100.

(*b*) 1 Cham. R. 98.

1871.

Re Mason.

speaking, a father is bound to maintain his infant children, if he can, whatever their circumstances may be, and no allowance will be made to him out of the property for this purpose (*a*). It is only where the father is unable to maintain and educate his children in a manner suitable to the fortune to which they are entitled, that an allowance is made (*b*). Here the father is a farm labourer, and the small sum of money to which the son is entitled, does not warrant his expecting or receiving other than such as any labourer's child received. A good education suited to his station in life is within his reach, as it is within the reach of every child in this Province. If the father is a sober, industrious man, he can from his earnings maintain himself and the infant (his only child), and, if he is not, it will not be for the infant's benefit that he should have the control of the profits or annual income arising from the infant's estate. I cannot see that the annual income of the infant's property is at present at least required for his support, and it should be allowed to accumulate for his benefit.

Judgment.

What I fear is, that, if the small piece of property (twenty acres) is purchased for the infant, the profits arising from it will be unnecessarily expended from year to year; and, when he comes of age, he will find himself the owner of a piece of ground too small to farm to advantage, and which he may find it difficult to dispose of except at a sacrifice. If, on the other hand, the money is kept properly invested, and the annual interest allowed to accumulate, he will, when he is twenty-one, have over $1,000, a sum which will go a considerable way towards paying for a partially cleared farm, or enable him to start in some business, if so disposed.

(*a*) 4 M. & C. 95.

(*b*) 1 Bro. c. c. 386; 3 Bro. c. c. 69; 7 Sim. 199.

1871.

BELL v. CHAMBERLEN.

Production—Mortgagor and mortgagee.

A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute.

[November, 1871.]

This was an application to compel the defendant to file a further and better affidavit on production. The only point argued was, as to the right of the plaintiff, the mortgagor, to compel the defendant, the mortgagee, to produce the mortgage for inspection.

Mr. *Gordon*, for the plaintiff, cited *Patch* v. *Ward* (*a*).

Mr. *Foster*, for the defendant, contended that at the most inspection could be ordered only where the question of title was in issue. Here it was not, as defendant admitted plaintiff's right to redemption.

THE REFEREE IN CHAMBERS.—The plaintiff applies for an order for a better affidavit on production, and for the production of certain deeds and documents, the right to have produced all the deeds referred to is conceded, except as to the mortgage deed; this is resisted. The bill is for redemption, and the right to redeem is admitted by the answer. The plaintiff relies on *Patch* v. *Ward* (*b*), and the language of V. C. *Stuart* there used. Production was refused in *Gill* v. *Eyton* (*c*), *Lewis* v. *Davies* (*d*), and *Crisp* v. *Platel* (*e*). In that case there were several mortgages. The validity of one was disputed, yet production was refused. In *Freeman* v. *Butler* (*f*), which was an administration suit, defendant was an executor and trustee, and also mortgagee; an order was made to Judgment.

(*a*) L. R. 1 Eq. 486.
(*b*) 1 L. R. Eq. 436.
(*c*) 7 Beav. 155.
(*d*) 7 Jur. 253.
(*e*) 8 Beav. 62.
(*f*) 33 Beav. 289.

1871. Bell v. Chamberlen

produce all deeds and documents except the mortgage deed and title deeds. Whether a party is bound to produce or not, seems to depend on the right to redeem being admitted or denied. In *Howard* v. *Robinson* (*a*) *Kindersley*, V. C., says: "If a mortgagor files a bill simply to redeem, and states the deed, and defendant by his answer admits it when the case comes to a hearing, and not before, the mortgagor has a right to see the deed.

Jones v. *Jones* (*b*) may also be referred to.

Re McMorris.

Costs.

In a case where infants were interested, and it was necessary to have the conveyance settled by the Master, and one of the parties to the conveyance being out of the jurisdiction it also became necessary to obtain a vesting order; the Referee allowed the purchaser the extra costs so incurred.

But a question being raised as to the executors, and it being shewn that they disclaimed all interest when applied to, no costs occasioned by such question were allowed.

[December, 1871.]

Statement.

Mr. *Foster*, for the purchaser, claimed that he should be allowed the costs occasioned by the necessity of having the conveyance settled by the Master: *Rodgers* v. *Rodgers* (*c*). He also claimed costs occasioned by a question of how far the executors were bound to join in the conveyance. One of the parties to the conveyance was out of the jurisdiction; and the costs of obtaining a vesting order as to his interest should be paid out of the estate: *Hodgson* v. *Shaw*. (*d*)

(*a*) 4 Drew 526.
(*b*) Kay App. 6.
(*c*) 2 Cham. R. 241.
(*d*) 16 L. J. Ch. 56.

Mr. *Holmested*, contra. There should be no costs occasioned by the question about the executors. The executors have executed a disclaimer; and would have done so sooner, had they been applied to. The purchaser, however, may be entitled to the costs of the vesting order.

1871.

Re McMorris.

MR. TAYLOR, REFEREE IN CHAMBERS.—The purchaser is entitled to the additional costs occasioned by the infancy of the heir requiring the conveyance to be settled by the Master: *Rodgers* v. *Rodgers*, (*a*) *Brown* v. *Lake* (*b*). He seems also entitled to the costs of the vesting order, one of the parties necessary to the conveyance being out of the jurisdiction: *Billings* v. *Webb* (*c*).

I do not think I can give him the costs occasioned by the question raised about the executors being necessary parties to the conveyance. In *Hodgson* v. *Shaw* (*d*), where the dispute raised was as to a right of way, no costs were given to the purchaser, though the Court said a purchaser might have costs occasioned by a special case. I cannot say that the question raised here was more special than the one in *Hodgson* v. *Shaw*. Besides, the executors on being applied to executed a disclaimer; and it is said that had that been required to do so sooner they would have signed it, and so these costs would not have been incurred.

Judgment.

(*a*) 2 Cham. R. 241.
(*b*) 15 L. J. Ch. 34.
(*c*) 1 D. & Sm. 716.
(*d*) 11 Jur. 95.

1871.

McLEAN v. CROSS.

Costs of suit when subject matter settled—Costs of bill unnecessarily filed —Local Masters and Registrars.

The rule of this Court, that when the subject matter of a suit is settled by defendant before decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless the defendant consents, applies to mortgage suits.

A defendant in such a case may insist on the suit going to hearing as there may be grounds on which he may be relieved from costs. Where under such circumstances the Referee refused an application by plaintiff for the payment by defendant of the costs of the suit an appeal from such order was dismissed with costs.

Where a bill had been filed on a mortgage on which only a small sum for interest had become due two days previously, and the defendant's solicitor had called at the plaintiff's solicitor's office and left word that he was ready to pay the money; the Court refused the plaintiff his costs, and *held* the bill was unnecessarily and improperly filed.

Local Masters and Deputy Registrars of the Court are not at liberty to practise in partnership with solicitors practising in this Court, although they may not actually share in the emolument of suits.

[December 8, 1871.]

Statement. A foreclosure bill had been filed on a mortgage on which there was due for interest the sum of $24, payable in advance. This sum the defendant had remitted by mail before the bill was served, and it had reached the plaintiff before the service. The plaintiff moved before the Referee for an order for costs, which was refused on the ground that the Referee had no jurisdiction to dispose of costs in such a case except by the consent of the defendant. This the defendant refused, alleging that on the merits, if they could be gone into, he was not liable for costs. The plaintiff appealed from the Referee's order, and the appeal was heard before the Chancellor.

Mr. *Bain*, for the appellant.

Mr. *C. Moss*, contra.

It appeared on the statement of the facts that the defendant's solicitor had called at the office of the plaintiff's solicitor a few days before the interest fell due, for the purpose of ascertaining if plaintiff would accept payment of the whole mortgage money: he did not see the solicitor; and on the day after the instalment of interest fell due, or the following one, the bill was filed.

1871.
McLean v. Cross.

SPRAGGE, C.—That surely was extraordinarily sharp practice.

Mr. *Bain*.—The defendant had made default, he was not entitled to pay the money, and the plaintiff stood on his strict rights, and so informed the defendant. There was no sharp pactice: the default had taken place.

THE COURT.—No intentional default.

Argument.

Mr. *Bain*.—It is not necessary that I should shew or argue that there was: it is sufficient for my purpose that a default has actually occurred. The case of *Wilde* v. *Wilde* (*a*), on the authority of which the Referee decided, is not applicable: in that case there was some question or issue to be still disposed of which distinguished it from the present case. Here there is no room for doubt that the plaintiff was entitled to a decree *with costs*, and no question was open to be disposed of at the hearing: *Green* v. *Adams* (*b*).

SPRAGGE, C.—Has the Referee power to dispose of the costs of a cause?

Mr. *Bain*.—There was no discretion to exercise here, the plaintiff was entitled to costs on a *præcipe* decree, and as a matter of course, and there was nothing to be

(*a*) 4 De. G. F. & J. 348. (*b*) 2 Cham. R. 134.

1871. disposed of or to exercise judgment on, in that case the Referee would have jurisdiction.

McLean v. Cross.

Mr. *C. Moss.*—In *Wilde* v. *Wilde,* the motion was resisted on the ground that the Court had no power to dispose of the question of costs on an interlocutory motion. The fact of the suit being a mortgage suit could make no difference. The defendant has sworn to an answer, and if this motion is refused he will apply for leave to file it. The defendant has set up in the answer the same facts that he now states on affidavit, and they must be disposed of on the hearing, not on a Chamber motion. If the merits of the case could be gone into, it would appear that the bill ought never to have been filed, and the plaintiff would not be entitled to his costs. The bill prays payment of $400. The defendant had offered plaintiff $400 and costs. This the plaintiff refused, and only asks for $24, for interest which is payable in advance. There was only two days default in the payment of the $24, and defendant's solicitor had gone to the office of the plaintiff's solicitors and left word he was ready to pay the money, he received no answer or communication, before the suit was commenced, from such solicitor. On the 4th of May he sent the $24 for interest which appears to have been paid to the plaintiff on the 8th of May, at which time the office-copy of the bill was in the hands of the sheriff. Defendant is still willing that the plaintiff should have his costs if he will take the principal money claimed in his bill; but defendant objects to pay the costs of a suit for the payment of $24. *Green* v. *Adams* is no authority against us, that was an application by defendant to pay off the mortgage and dismiss the plaintiff's bill, and such an order could only be obtained on payment of costs. There is no order of Court, and according to *Wilde* v. *Wilde,* no practice allowing such a proceeding as is contended for here. *Chester* v. *The Metropolitan Railway*

Argument.

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Co. (*a*) is an authority for disposing of such a question in Chambers when *entered on by consent*, and is also an authority for us on the merits. *Rudd* v. *Rowe* (*b*) is an authority for the merits being considered on an application by defendant to stay proceedings when the subject matter of suit is settled. The Court does not regard such a suit as the present with favor, it is not set up that there was any danger of the money not being recovered unless very prompt action was taken; on the other hand plaintiff refused to take his principal, which shews he considered the defendant good for the money. It appeared, too, from the evidence, that before the money was due, the mortgage had been handed by the solicitor to his clerk with instructions to prepare and file bill if the interest was not paid on the day it fell due; although he knew that the defendant lived at a distance from Walkerton, and could not reply to an application for payment of the money in a short time. The money was due on the 1st of May, the bill was filed on the 3rd. The bill is endorsed as filed by *McLean & Shaw.* Mr. *McLean* is the Deputy Registrar and the son of the plaintiff. The plaintiff's refusal to accept the whole amount claimed by this bill, is an acknowledgment that this bill is filed to recover $24. The Court will not allow its process to be used for such a purpose. *Westbrooke* v. *Browett.* (*c*)

Argument.

Mr. *Bain.*—Defendant's contention is that the whole principal is due, and he offers to pay it off; plaintiff disputes this, and that is the issue raised; plaintiff was not obliged to take the money; as to the suit, there was no undue haste; he wrote to defendant; that fact is not denied, it was the defendant's duty to pay; he knew when the money was due; it was not for the mortgagee to come to him, he should seek the mortgagee

(*a*) 11 Jur. N. S. 214. (*b*) 10 L. R. Eq. 610.
(*c*) 17 Grant 339.

1871. and pay his money. *Chester* v. *Metropolitan Railway Company* (*a*) was an extreme case, for there costs had actually been incurred after the suit was settled, at any rate it is not applicable here, the English practice would not be the guide, for we have a practice provided for us, and by that we are entitled to a decree with costs. The bill has been noted *pro con.* and we are entitled as of right to such a decree. The costs follow as a right, we had no other course open to us to recover the interest, and there are no grounds for saying the application should be regarded with disfavor,

McLean v. Cross.

SPRAGGE, C.—The result of the authorities appears to be that a plaintiff cannot obtain an order upon the defendant to pay the costs of the suit unless the defendant submit to their being disposed of on motion. The defendant may say I am content to pay your demand or to submit to do what your bill asks for, but I ought not to pay the costs.

Judgment.

Mr. *Bain* says that the cases establishing this do not apply to such a case as this; that the bill is by a mortgagee for payment of mortgage money, and the defendant has paid it without putting in an answer, and that if he had not paid it, the plaintiff would have been entitled to a decree upon *præcipe*, and of course with costs.

I am not prepared to say that the plaintiff in such a case must get his costs at the hearing. I find by the affidavits filed that the defendant desired to put in an answer, the draft of which is among the papers, and that he applied for the consent of the plaintiff's solicitor; which was refused. He might and probably would have obtained leave to file it, and it does not follow that the costs must in such a case be given against the

(*a*) 11 Jur. N. S. 214.

defendant at the hearing. There may be reasons for depriving the plaintiff of them, and a defendant having satisfied the plaintiff's demand may, it seems, decline to discuss the question of costs on a summary application; and he appears to have done so in this case. Upon this the Referee dismissed the application; and I think that he was right. 1871. McLean v. Cross.

The parties have, however, entered into the merits of the case before me; and I can come to no other conclusion than that this suit was unnecessarily instituted. The defendant is the purchaser from the mortgagor of his equity of redemption in the mortgaged premises. The mortgage, made in April, 1864, was for $400, bearing interest at 12 per cent. payable in advance, half yearly; the interest appears to have been paid regularly. One half year's interest was payable on the 1st of May, but the defendant was anxious to pay off the whole mortgage, on account of the rate of interest being so heavy, and his solicitor a few days before the 1st of May went to the office of the plaintiff's agent at Walkerton in order to pay it off if the mortgagee would receive the mortgage money. The mortgagee lived in Toronto when the mortgage was made; his agent, his son lives in Walkerton, and the defendant and his solicitor live in Oakville. The defendant's solicitor sent to Walkerton to pay off the mortgage. His solicitor saw the law partner of the plaintiff's agent whom he informed of the object of his visit, and left a message with him for the plaintiff's agent who was absent at the time. I have no doubt from the evidence that the defendant was prepared to pay the whole mortgage debt and would have paid it if the plaintiff's agent would have received it; or if he refused to receive it, that he would have paid the half-year's interest, $24, and I think that the plaintiff's agent could have no reason to doubt that the defendant would have done this. The defendant's solicitor unable to meet with the plaintiff's agent returned Judgment.

1871. to Oakville. The interest was payable on the 1st of the month. On the 3rd a bill to foreclose was filed in this Court *i. e.* leaving only one day's interval between the day the money was payable and the filing of the bill.

McLean v. Cross.

The plaintiff's agent, Mr. *McLean*, of Walkerton, says that he wrote to the defendant several days before the 1st of May, notifying him that unless the interest was paid when due a bill would be filed against him. This could have been at any rate but a few days before the 1st of May, as the defendant's solicitor proves that it was on the 24th of April that he was at the office of *Shaw, McLean & Ferguson*, in order to pay the money; and Mr. *McLean* was then out of town. He returned and then wrote; and both the defendant and his solicitor, who were looking for a communication in answer to the defendant's proposition, swear that they received none.

Judgment.

Looking at the mortgage itself and its registration, and what has occurred since, in regard to the mortgage money and its payment, it will be seen how blameless has been the conduct of this defendant, and how much reason he really has to complain. The mortgage bears date 22nd of April, 1864, and was given by one *Ira Mulholland* from whom the present defendant purchased the equity of redemption: at that date the mortgagee was a resident of Toronto. He afterwards went to England, where he remained until very recently leaving his family in Toronto, and his son *William Allan McLean*, his agent. After awhile—the dates are not given—the mortgagee's agent went to Walkerton, where he has resided ever since. This does not appear to have occasioned any difficulty to the defendant, as it was the agent's practice to leave receipts with the family in Toronto, and the defendant paid his interest to the family in Toronto receiving a receipt therefor: but after awhile, again, the mortgagee's family removed to

Walkerton; and the defendant was in default for a short time in consequence of this change; and a bill was filed against him for the half-year's interest due in November. I have already dealt with the half-year's interest due the following May.

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I find, upon looking at the memorial of the mortgage, that it differs materially from the proviso for redemption contained in the mortgage itself. The principal sum is the same. £100, "with interest thereon on the days and times and in manner following, that is to say, in equal half-yearly payments, in advance, on the 1st days of May and November, A.D. 1864, and the last payment to be made on the 1st day of November, A.D. 1864." In the mortgage itself the principal money is made payable on the 1st of November, 1874. The memorial is signed by *Mulholland*; the mortgagee's son, the same who afterwards became his agent, being one of the witnesses, and the affidavit for registration being made by him. I do not know, however, that the defendant was misled by this; and it is perhaps not very material. What is material is that the defendant was never intentionally, or through his own neglect in default; and that two bills have been filed against him in this Court and each for the paltry sum of $24 and that too for interest payable *in advance*; when it was known to the plaintiff's agent that the defendant had always evinced the utmost readiness to pay punctually; and was prepared to do so upon both the occasions when bills were filed against him. The conclusion seems to me irresistible that this bill (I confine myself to this bill because it is the only one in question) was not filed for the purpose for which alone it could properly be filed, the recovery of the interest on this mortgage, but unnecessarily; I cannot say for the purpose of making costs to go into his own pocket, for Mr. *McLean* swears that though the bill was filed by his law partner, he (*McLean*) gets none of the costs of

Judgment.

1871. proceedings in Chancery. Still it was filed unnecessarily, and therefore improperly; and I am glad to find that *Wallis* v. *Wallis* (*a*), and *Rudd* v. *Rowe* (*b*), furnish precedents for refusing costs to a plaintiff in such a case as this. I think I should have refused the costs if there had been no such precedents. This case, and the affidavits filed upon this application, demonstrate the propriety of the rule of this Court, that local Masters and Registrars are not to practise their profession, in partnership with any solicitor who is at the time a practitioner in this Court.

McLean v. Cross.

This appeal is dismissed with costs.

THE FREEHOLD PERMANENT BUILDING SOCIETY v. CHOATE.

Notice—Setting aside sale.

An auctioneer acting under an order for sale, or Master, or other officer conducting such proceedings, is not bound by an order staying the sale, of which he has not notice.

Where an order staying a sale for three weeks was granted on the day the sale was to take place, and the Registrar telegraphed to the Master conducting the sale that such order was granted, and the message reached him after the sale, but before payment of the purchase money; an order made by a Judge in Chambers, refusing an application to set aside the sale was sustained by the full Court on rehearing.

[REHEARING TERM, December, 1871.]

Statement. An application had been made to Vice Chancellor *Strong* to set aside a sale under the following circumstances. The plaintiffs had proceeded under the decree made herein, as reported in 18 Grant, page 412, and a final order for sale had been obtained, and a sale of the mortgaged property was advertised to take place on the 10th of June. On that day a motion to stay the sale, until a bond to answer the costs of an appeal from the decree should be filed, was heard before *V. C.*

(*a*) 4 Drew. 468. (*b*) 10 L. R. Eq. 610.

1871.

Freehold Permanent Building Society. v. Choate.

Strong, and an order staying the sale for three weeks was granted on payment into Court of $80, to cover the costs incurred in preparing for the sale. The deposit was accordingly paid, and the solicitor who had moved for the stay procured the Registrar to telegraph to the auctioneer conducting the sale, that the stay had been granted; but before the message reached the auctioneer the sale was concluded, and one *Walker* had been declared the pnrchaser. The purchaser paid the usual deposit, and the Master made his report on sale, confirming the sale, and with a special finding as to the order staying the sale, and reporting also that no notice of such order had reached the purchaser prior to his having signed the agreement and paid his deposit. The order itself was not issued until three weeks after it had been made, and it was never served on the purchaser.

Argument.

THE VICE CHANCELLOR refused to set aside the sale, and this decision was reheard at the instance of the defendant *Ashford*.

Mr. *Crooks*, Q. C., for the defendant *Ashford*.

The evidence will be found to establish the fact that the deposit on account of purchase money was paid by the purchaser, after notice to him of the granting of the order to stay proceedings.

SPRAGGE, C.—How came the application to be made so late?

Mr. *Crooks*.—The Vice Chancellor must have been satisfied as to the cause of the delay before he granted the order.

STRONG, V. C.—With regard to injunctions, and I presume the rule here is the same, notice of the grant-

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ing of the injunction is inoperative unless it is followed up by prompt service of a copy of the order or injunction. Here they were not bound to have obeyed the order, unless they knew that the terms on which it was granted were complied with and the money paid in.

MOWAT, V. C.—The telegram was from the Registrar, and coming from an officer of the Court, we should have to hold that they should have accepted the statement as true.

Mr. *Crooks*.—It has been urged that the order staying proceedings was not drawn up for some time after the sale; but it is not right or reasonable for a party who has notice of an order to assume that it may turn out wrong or irregular, it is his duty to obey it. In this case the purchaser had notice, before completing his purchase, of the granting of the order, and he should have obeyed it. The doctrine of the Court is, that if a purchaser can be put *in statu quo*, the Court will interfere to do right between all parties, and it then becomes a question of costs or terms: here the question is between two innocent parties, the defendant and the purchaser, and the Court will do justice between them.

Argument.

STRONG, V. C.—When a Master's report has been confirmed, it is equivalent to an order of the Court. Here you have to get over not only my order, but the confirmed report.

Mr. *Crooks*.—The motion before Vice Chancellor *Strong* was of a two-fold nature; it was to open up the biddings, and set aside the sale. The report was right: the Master had no jurisdiction to report otherwise than he did. An appeal from his report would not have answered defendant's purpose, but a substantive motion was made to set aside the sale and open

the biddings; there was therefore a motion to impeach the report, and it cannot properly be said to be confirmed. We could not say that the report was erroneous, but the report would necessarily fall with the sale which we attacked.

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SPRAGGE, C.—Could he not have appealed, and tried the question of regularity?

Mr. *Crooks*.—We wanted something further than we could have got by setting aside the report: we needed some further order of the Court.

SPRAGGE, C.—But notwithstanding you could have come before the time for the report to become confirmed had expired,—the order of 10th June stayed the sale for three weeks,—it is to be presumed the Court did right, and if the order was disregarded the Court would set the sale aside.

Argument.

Mr. *Crooks*.—The rule is, that biddings will not be opened, except under special circumstances. The extent to which biddings were allowed to be opened in England was found to be objectionable *(a)*. There was no finality nor certainty as to sales; but this case is free from any such features and considerations. The present application is not on the same footing as a case to open biddings. The policy of the Court is in favor of what we ask: if the Court cannot interfere now, it would render itself powerless to set aside a sale, although made in contravention of its own order.

Mr. *McLennan*, on same side. It must be borne in mind that this is a mortgage case, that the sale was for a special purpose, namely, to pay the encumbrancer his money. A case of this kind will receive more consideration at the hands of the Court than other cases.

(a) 1 L. R. Eq. 404.

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The Court will always protect the interest of the mortgagor to its utmost power, and if the Court can give him indulgence without injuring the creditor, it will give it him. It cannot be doubted that if the debtor comes at the last moment, offering payment of his debt, the Court will relieve his estate from the claim; and if the owner comes, however late, and satisfies the Court that he can in a brief period satisfy the debt, the Court will indulge him and give him time. If the debtor had come on the day of sale and tendered the money, the sale could have been set aside.

STRONG, V. C.—But that has not been done.

Mr. *McLennan*.—I am arguing the principle that the Court can interfere to do justice, and that, if in the case I suggest an order could be made, it can be done here. The authority of the auctioneer was revoked the moment the order of the 10th of June was made, and his act and the sale were inoperative: it was not the case of an owner selling his own property; the Court was effecting a sale for a certain purpose; the only authority of the auctioneer was the order for sale, and that order was subsequently qualified by the Court making another order. This is apart from any question of notice to the purchaser. The order for stay has since been duly taken out. No one has attacked the order. If the order was bad, they should have set it aside, not disregarded it. The order is in force yet; and we come here on the strength of it and ask to set aside the sale. In *Manser* v. *Buck* (*a*) the printed conditions of sale had been altered. Some copies only were altered, and the auctioneer signed one which was not altered. The purchaser claimed to have the sale carried out without the alterations, and the Court held that the auctioneer had no power.

Argument.

(*a*) 6 Hare 449.

STRONG, V. C.—That was not a sale under a decree. 1871.

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Mr. *McLennan*.—This is a case in which the Court should give relief, if it can. Property worth $18,000 had been sold for $10,000; the mortgagor was under pressure: the debtor did all he could: he went before the Master and urged all he could: he was active in supporting his interests. The additional bond in Appeal was filed the 22nd of June. The purchaser was aware of the efforts made by the mortgagor.

Mr. *S H. Blake*, for the plaintiff. If this had been an application in the ordinary way to open biddings, the plaintiffs need not have cared as long as their interests were protected; but it is not an application to open biddings, and the plaintiffs therefore opposed it: the property has depreciated, the buildings thereon have been burnt, and the Company is desirous to hold the present purchaser to secure their money.

Argument.

Mr. *McLennan* offered to pay into Court a sufficient amount to make the plaintiffs safe.

Mr. *Blake*.—As to that, the money should be here. It is not sufficient, when asking an indulgence, to say you will do this or that. The case has not been set down for appeal. His Lordship's order of the 10th of June was granted on the assurance that the case was to be set down in appeal; the order was asked for on that ground. The order for sale was not discharged, but the sale under it postponed, and that postponement was to effect a purpose which has not been carried out. When no appeal was taken in proper time, the order would fall. Certain steps were necessary to enable the party to go to appeal: his bond was to be put in and approved of by a Judge, and the order granted was contingent upon his doing all these acts. It was no absolute stay,—the utmost that could be said

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on the other side would be, that the purchaser was a conditional purchaser; but if the contingency on which the condition rested; the appeal, did not take place, he was an absolute purchaser, and he was such now in every sense. The defendant delayed to pass and enter his order, and evidently treated it as a nullity. In *Dickey* v. *Heron* the purchaser bought with the decree before him, and yet he was protected (*a*). In *Gunn* v. *Doble* (*b*) the Court held, that, where a purchaser took without notice, he would be protected. Order 388 extended the rule laid down in *Gunn* v. *Doble*; but supposing every other difficulty out of the way, the confirmation of the report was still in the defendant's way. It was his duty to have come promptly to the Court and have asked to have proceedings stayed. Had he done so, he would have been asked what steps he had taken towards appealing. The order of 10th June would then have come up, and the stay would have been refused on the ground that he had not proceeded in appeal. *Tolson* v. *Jervis* (*c*) was mentioned.

Argument.

Mr. *C. Moss*, for the purchaser. As to the argument of Mr. *Crooks*, that the sale must fail because it took place after the granting of the order of 10th June, an *ex parte* order made and not served has no effect: *Young* v. *Smith* (*d*). In this case the purchaser had no notice of the application for the order of 10th June, and the order is therefore an *ex parte* order as to him. Then the order was not drawn up for a length of time, and, until it was drawn up, it was in fact no order. Until the order is drawn up the Judge may change his mind. The Court has a *locus penitentiæ*. In *Re Sharpe* (*e*), an appeal from a Judge in insolvency, no order had been drawn up and the application was

(*a*) 1 Ch. Ch. Rep. 149.
(*b*) 15 Grant 655.
(*c*) 8 Beav. 364.
(*d*) 3 Mad. 196; Dan. Ch. Pr.
(*e*) 2 Cham. R. 67.

refused (*a*): *Gibb* v. *Murphy* (*b*). As to the argument that the Court will protect the mortgagor, the Court will go equally far to protect a purchaser: *Davy* v. *Durrant* (*c*). All the purchaser was bound to do here, was to see that there was a proper decree for sale: *Gunn* v. *Doble* (*d*); *Collins* v. *Denison* (*e*). Mr. *McLennan* has argued that the sale was nugatory, that the authority of the auctioneer was revoked. This is answered by a reference to the Property and Trusts Act (*f*). The auctioneer proceeded without notice of the revocation; and his acts are binding and valid. The property in this case has not been sacrificed to an extent which would affect the conscience of the Court. The application to set aside the sale was one for the discretion of the Court, and on that ground the order made thereon was not applicable (*g*).

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Mr. *McLennan*, in reply. Mr. *Blake* has argued that because we are not yet in a position to appeal, that this application is not maintainable; but this is met by my offer to pay in the money, and protect his clients. We may not succeed in getting leave to appeal, but nevertheless the relief we now seek would be very valuable to us. If the sale is allowed to stand it will be a great loss to defendant, but if set aside would be a benefit to him, whatever the result of an appeal. If the plaintiff is protected, a measure of relief may be afforded the defendant by which the purchaser will not be injured.' No sufficient authority is shewn for saying that the order did not take immediate effect. The delay in issuing it was not excessive. Plaintiff's solicitor knew, and had been notified, that the order was granted.

Argument.

(*a*) Dan. Chy. Pr. 1366. (*b*) 2 Cham. R. 182 192.
(*c*) 26 L. J. N. S. 830; S. C. 1 DeG. & J. 535.
(*d*) 15 Grant, 655. (*e*) 2 Cham. R. 465.
(*f*) 29 Vic. (1865) ch. 28, s. 24. (*g*) Dan. Ch. Pr. 1347.

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SPRAGGE, C.—This point is suggested by Mr. *Blake*. The order of 10th June stayed the sale for three weeks, for a special purpose, *i. e.*, in order to *Ashford* in the meantime perfecting his security for appeal. If security not perfected at that time, the sale was to proceed. The sale did take place on 10th June. That made no difference as to perfecting his security. If the sale had not taken place on 10th June, it would have taken place on 1st July, on *Ashford's* default in not perfecting his security. This would be material upon the question of the exercise of discretion as to setting aside the sale.

The numerous delays that have occurred from the pronouncing of the decree up to the present time, are material upon the same point.

Judgment.

The fact that at this moment *Ashford* is not in a position to carry his case to the Court of Appeal, is also material upon the same point. The year has elapsed. The Vice Chancellor refused to set aside the sale on the ground that the sale was regular; and that it was not a case for the exercise of discretion.

As to discretion, if it is a case for the exercise of discretion, there is this to be said in favor of *Ashford*, that it is not like a case for opening biddings. In that case the only question is (or rather was) how the best price could be obtained. The thing to be sold is to be sold at all events; the time and mode are the only questions. While here, if the decree is wrong, there will be no sale at all; and further, it is *the right* of the appellant to stay the sale pending the appeal (though a right that he can only exercise upon certain terms). I quite agree therefore in the propriety of granting every reasonable indulgence in the way of staying the sale, to enable the defendant to perfect his security. But there are limits to this, and I can under-

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stand the hesitation of the Vice Chancellor on the 10th June, as to staying the sale after all the delay that had occurred. The first question is, was the sale regular. If it was, could the Vice Chancellor, sitting in Chambers, set it aside, or exercise any discretion. The Master's report of sale stood confirmed. The special circumstances reported did not affect its confirmation, they only afforded material for moving against it; and it has not been moved against, though notice of motion was given. Then was the sale regular?

What was the effect of the order staying the sale? The sale was to be (and was) at Port Hope, on 10th June, at noon. The order was pronounced on that day, before the sale actually took place. The deposit was paid in, and the officer of the Court telegraphed to the auctioneer to stay the sale before it actually took place. The telegraph did not reach till after the sale, and after the audience had dispersed.

Judgment

It was felt by the Judge to be doubtful whether the telegram would reach in time; and he meant his order to be operative only in the event of its reaching in time, but did not say so. Is that to be implied? The order was only to *stay the sale*. It was *impossible* that it could have that effect, unless it reached the auctioneer in time. It is true that it is not so expressed, but is it not a matter of necessary implication? An officer of the Court was proceeding to carry out its order to sell certain lands; when, upon application by a party, the Court sees fit to stay the hand of its officer, and to order that he shall not at present proceed to sell. The order is that, upon certain terms, the sale of the lands in question in this cause "be postponed for three weeks from to-day." It is, in effect, an order on the officer not to proceed with the sale for three weeks. The order necessarily imports

1871. that the officer is to be notified of the order in such time as that it shall be possible for him to obey it. And such an order would most certainly not be granted if it were plainly impossible that it should reach the officer in time for him to obey it; *e. g.*, in the case of a sale at Owen Sound, before the recent establishment of the telegraph to that place, to take place on the same day. I should think that in such a case as this, it is to be understood that the order is conditional upon its reaching the officer in time. To interpret it otherwise would involve this absurdity, that the Court might be forbidding that to be done, which had been done already.

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It seems to me analagous to the case of an agent having authority to contract for the sale of an estate; and who enters into a contract for its sale; his principal executing a revocation of his authority, before the contract of sale; but the revocation not reaching the agent till after the contract had been entered into, the contract would be binding upon all parties.

Judgment.

Another analogy is, that of an interim restraining order, issued in urgent cases in lieu of an injunction. Until the party restrained is notified of the order, he is not affected by it. He may do the act the order forbids his doing; and it is no contravention of the order: and so, *pari ratione*, there was here no contravention of the order postponing the sale—which I read as an order to the officer not to proceed with it—until the officer was notified of the order.

The sale is moved against solely on the ground that it was proceeded with after the order of the 10th June was pronounced. Now was there any reason why it should not be proceeded with; all the parties acting in the matter of the sale were doing their duty: the officer conducting it was acting under instructions

from the Court, and had to proceed with the sale; and the sale took place and the contract was entered into with the purchaser, without any notification that all was not regular and correct. It would, it seems to me, be giving a strained, and I may say a violent and unreasonable effect to the order pronounced on the 10th June, if it is made by its mere operation, without more, to avoid this sale. There may be reasons why the sale should be set aside: my position just now is, that the mere existence of the order of the 10th June is not, *per se*, a reason for setting it aside.

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The learned Vice Chancellor was of opinion that, sitting in Chambers, it was not competent to him to set aside the sale as a matter of discretion. He refused to set it aside as a void or irregular sale, and I think he was right. It is to be presumed that if he had conceived it to be open to him to exercise his discretion, he would not have set it aside as a matter of discretion: for he says that if it had been suggested to him, or if it had occurred to him, he would have made it in terms a condition of the order that it should have no operation unless notified to the auctioneer before the actual taking place of the sale. Assuming for a moment that it were open to us now to exercise discretion in regard to the setting aside of this sale, my own opinion is, that it would be an unwise exercise of discretion under all the circumstances that have occurred, to set it aside. I think the order should be affirmed, and with costs.

Judgment.

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PERRIN V. PERRIN.

Administration—Appeals from the Referee.

On an appeal from the Referee the case will be confined strictly to that made on the original motion, and only such pleadings or other documents as were then read will be allowed to be used.

The Court will inform itself of what these were, and take notice of its own records and proceedings when it becomes necessary.

When a question arose as to what pleadings had been read on a motion the Court sent for the Referee's notes, and was guided by them.

Where an order for administration had been granted to a devisee who was also a creditor of the estate to a large amount, but did not state that fact when applying for administration, his silence as to it was considered a ground for sustaining an order transferring the conduct of the proceedings under the reference to another party interested under the will.

No one has a special right to the conduct of proceedings in the Master's office upon a reference under an an administration order, but *ceteris paribus* it will be committed to those who have the greatest interest in conducting them properly and economically.

[September 12, 1871.]

Statement

Mr. *Hodgins* appealed from an order of the Referee granting the conduct of the administration of the estate of *Perrin*, deceased, to *Helen C. Crysler*.

A suit of *Perrin* v. *Perrin* had been instituted and was still pending to set aside the will of the deceased *Perrin*. The testator died on 5th July, 1870, an administration order was granted to *Andrew Perrin* on the 6th of September, 1870, but the reference directed had not been proceeded with in the Master's office awaiting the decision of questions which arose in the pending suit. On the 30th June, 1861, *Helen C. Crysler* a granddaughter of the testator, applied that the prosecution of the order should be committed to her, and the Referee made an order to that effect against which the present appeal was made.

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Mr. *Hodgins* contended that the administration order ought not to be proceeded on, until the question of the validity of the will was disposed of. He was proceeding to read the bill and answer with a view of shewing the issue in the cause when it was objected by Mr. *Blake* that the answer was not read before the Referee.

Mr. *Hodgins*.—The bill was read, however, and that gives me a right to read the answer, and I believe, indeed, that both bill and answer were read.

A question arising as to this fact the Referee's book was referred to which shewed that the bill only had been read.

SPRAGGE, C.—I must be guided by the Referee's book. It is not a necessary inference that the answer was read because the bill was.

Argument.

Mr. *Hodgins* then asked permission to read the answer, but the Chancellor considered it would be a bad precedent to grant such permission, and refused it.

Mr. *Hodgins* continued his argument justifying as his contention tended the delay that had taken place, and objecting to the granting of the order. The charges of collusion between the plaintiff and the defendant were denied *in toto* as were also the charges of delay. There was a bill on the files questioning the validity of the will they were seeking to administer. It is shewn that counsel advised that, pending the suit, the administration proceedings in the Master's office ought not to go on: hence the delay. The only evidence of collusion was the statement of Miss *Crysler*. *Harris* v. *Gandy* (*a*). *West* v. *Laing* (*b*), *Re Babcock* (*c*), were mentioned.

(*a*) 1 DeG. F. & J. 13. (*b*) 3 Drew, 334.
(*c*) 8 Grant, 409.

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Mr. *Charles Moss*, on the same side. The sole interest of Miss *Chrysler* is under the will and amounts to $100. If she claimed against the will she would, if legitimate, be entitled to one-fourth share, but she is treating the will as valid by seeking administration of it and cannot claim against it. The person who has the greatest interest in the estate is the party to whom administration ought to be granted. *Penny* v. *Francis* (*a*). The alleged intemperance of the executor is strongly denied; and Mr. *Hardy* says he is a very proper person to manage the estate.

The order is the ordinary administration order, and does not shew that it is by consent. *Andrew Perrin*, to whom administration was originally granted, was entitled to his order for administration; and there is nothing to shew that he did not obtain it *bona fide*. *Williams* v. *Chard*.

Mr. *S. H. Blake*, contra, supported the Referee's order, contending that there was sufficient evidence of collusion, to make it imprudent to leave the conduct of the proceedings in the hands of *Andrew*, that the charge of collusion was not negatived except in general terms, but the mere danger of any collusion was sufficient to make the Court prefer another party.

Judgment.

SPRAGGE, C.—Upon the affidavits, it appears that the first application for an order for the administration of the estate was made or initiated by *Helen C. Crysler;* and that, between the service of the notice and its return, an order was obtained by *Andrew Perrin* for the administration of the estate, the executor and certain parties named as interested in the real estate being represented by solicitors. It is probably a proper inference, that this proceeding was taken in the way that it was, in order to intercept the application of

(*a*) 7 Jur. N. S. 248.

Helen C. Crysler. The order is dated 6th of September, 1870. 1871.

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Miss *Crysler* might reasonably have complained of this, and have claimed that, being a legatee, it was more proper that administration should have been committed to her than to *Andrew Perrin*, who applied for administration as a creditor; but she should have applied promptly, instead of which she appears to have acquiesced; for, on the 8th of March, 1871, she, by her solicitor, notified the solicitor of *Andrew Perrin* that she desired to attend the proceedings to be taken under the administration order granted to *Perrin*, and to be served with notices, &c., in the suit; and she states in an affidavit sworn 4th of February, 1871, in which she complains of the order, that she had made a similar affidavit in September; but was advised by her solicitor not to move in the matter until it was seen whether, or not, *Perrin* would proceed promptly under the order. Then, on the 8th of March, followed the notice to which I have referred.

Judgment.

After this abstaining advisedly from moving against the order, and then adopting it and electing to come in under it, it is too late for her to object that the order for administration should not have been granted to *Perrin*. I do not understand that she appeared in pursuance of her own notice and asked for an order; I see, indeed, that she states in her petition of June, that she had abandoned her application.

In June she applied that the prosecution of the order should be committed to her; and by order dated the 30th of that month, it was ordered that the conduct of the administration order should be given to her instead of to *Perrin*. After what had passed she could only ask this on grounds and for reasons which arose subsequently to her notice of March, 1871. Her grounds

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are, want of diligence on the part of *Perrin* in prosecuting the reference in the Master's office; that *Perrin* is an intemperate man; and that he has declared that the object of obtaining the administration order was to delay matters, and to keep the management of the estate in his own hands, and those of his brothers. I do not see how I can now be asked by the petitioner to look at the two last of these grounds, for those grounds were made by the affidavit of *Charles A. Perrin*, sworn on the 4th of February, 1871, the same day as her own affidavit was sworn; and the two affidavits are now put in by her. It was after these affidavits, *i.e.* on the 8th of March, that she gave notice of her desire to attend proceedings under the administration order. The alleged intemperance, and the language imputed to *Perrin*, implying a collusive delay of proceedings on his part, are denied by his affidavit; and it is at least inconsistent conduct on the part of the petitioner, to bring forward now these grounds of complaint after having taken a course which I must take as an election to forego them. I think, after what had passed, she could properly rest her claim to have the conduct of the administration of the estate committed to her only upon the ground of delay; not, however, that I should have discarded altogether the other grounds, if they had not been met by affidavit. I think she may be heard to say that, at that date and up to and past the 8th of March, the delay was not such as to impose upon her the necessity of moving to take the matter out of the hands of *Perrin*. Although she suspected him of delaying purposely, she might say this, because further delay on his part might strengthen her case; but, nevertheless, the charges are of such a nature as might well warrant an application then, and she not only forebore to apply then, but more than a month afterwards intervened actively in relation to the prosecution of the order by *Perrin*, assuming that he was still to conduct its prosecution. There is, however, as I find, another ground,

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which I will notice presently. But, first, as to the delay. *Perrin* proceeded promptly up to a certain point. He carried his order without delay into the Master's office. This was probably part of the plan, in order to intercept Miss *Crysler's* application, and he is not entitled to credit for it; but still it was a prompt step in the cause. Further, the advertisement for creditors was issued without any unnecessary delay. Since then, however, nothing has been done in the Master's office practically to carry out the administration of the estate; and, unexplained, this would be quite sufficient to warrant the transfer to other hands of the administration of the estate. The delay is thus accounted for. On the 20th of September, twelve days after the granting of the administration order, a bill was filed impeaching the validity of the will under which the estate was ordered to be administered, and *Perrin* was advised that, during the pendency of that suit, it was not advisable to prosecute the administration order, as proceedings under it might go for nothing in the event of that suit being successful. The suit was instituted by parties in the same interest as Miss *Crysler*, though she was made a defendant. There was no collusion between *Perrin*, who had the administration order, and the plaintiff in the suit. That suit might have been heard at the last spring sittings, but delay was occasioned by the answers of some of the defendants not being put in, in sufficient time. It is said that that suit was virtually, though not formally, abandoned before the sittings, *i. e.* that, upon the affidavit of production made by a defendant, a will was produced executed some time back by the same testator, and making a disposition of his estate so similar to that made by the impeached will, that there could be no object in further prosecuting the suit; and it is said that this was so obvious, that *Perrin* must have seen it, and ought to have proceeded at once with the administration of the estate. It does not appear, however, that

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any communication was made to *Perrin* of the views of the plaintiff upon the discovery of this former will; on the contrary, as I understand, there were communications between the solicitors with a view to the hearing of the cause after this former will had been brought in. All this time there was no intimation to *Perrin* that it was the desire of Miss *Crysler*, or of others interested in the estate, that he should proceed in the Master's office under the order that he had obtained, or any intimation that he ought to proceed; and the application of June was the first intimation he had that Miss *Crysler* or any of the parties looked upon his abstaining from proceeding as unreasonable under the circumstances. I do not find that the affidavits of February were in any way communicated to him.

Judgment.

Upon the whole I do not think that *Perrin* is justly chargeable with a delay that should disentitle him to the conduct of the reference. I think he was excusable, if not justifiable, in not proceeding, during the pendency of the suit impeaching the will; at any rate until after the sittings at Brantford, which I see were appointed for the 24th of April; and after that it was at least as incumbent upon those interested in impeaching the will, the family of which Miss *Crysler* is a member, to notify *Perrin* that the suit was not to be proceeded with, as it was upon *Perrin* to enquire as to their intentions in regard to it.

At the same time there is a good deal in what is urged as to *Andrew Perrin* not being the best hand to which to commit the administration of the estate. In his affidavit, made on applying for administration, he states himself to be a specific devisee of land, and one of kin entitled to an undisposed residue. I see by the copy of the will put in, that he is a specific devisee of a parcel of land, and a specific legatee of chattels. His title to participate in the undisposed of residue is dis-

puted on the ground of illegitimacy. Should this be decided against him, his strongest position for representing the estate and taking charge of its administration will be removed. In his affidavit, filed in answer to Miss *Crysler's* application, he swears that he is a creditor to the amount of between $3000 and $4000, being a balance of $9000, and of a further sum of $1000 upon other accounts

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On the other hand, there is a claim against the estate of a considerable amount by the executor himself. Both these claims are disputed by the members of the first family; and they say they are apprehensive that there will be mutual concessions in regard to these claims, by which their interests will suffer. It would be better certainly, if the administration of the estate had been in hands which would be free from any temptation to administer the estate otherwise than justly and economically. I cast no slur or suspicion upon *Andrew Perrin* in saying that the temptation may exist, and that it is the custom of the Court to commit administration to those who have an interest in the just and economical administration of the estate, and who have no temptation, whether yielded to or not, to abuse their trust.

Judgment.

I have thought it well before concluding my judgment to send for the papers upon which the administration order to *Andrew Perrin* were granted; and I find that in his affidavit he is silent as to his having any claim against the estate as a creditor: while in his affidavit, filed in June last, he states that the administration order was obtained by him, as a creditor for a large sum, to wit, several thousand dollars, as well as by virtue of an interest under the will of the testator. The two affidavits differ in another point: in the earlier one he says that by the will of the testator, "no disposition of the residue of the estate is made," while in the affidavit

1871. filed in June he says, "in so far as I am aware, and as I am advised, it is not true that the deceased left any real and personal estate undisposed of by his will." This, however, may be a mere matter of construction, and though the two statements are inconsistent, too much stress should not be laid upon it.

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Independently of *Andrew Perrin's* position as a creditor I was inclined to think that Miss *Crysler* had so acquiesced in and adopted his order of administration, and with knowledge of the facts set forth in the affidavits of February, that she could not be heard now to object on any of the grounds then known to her; and that the delay, under the circumstance was insufficient. But as it now appears *Perrin* did not obtain administration as a creditor at all, although in his later affidavit he swears that he did; and, so far as appears, his claim as a creditor was first disclosed in his affidavit filed in June last. It is his position as a creditor and the position of *William* who is his brother, making a claim upon the estate both of which claims are disputed by the other family that makes his position an incongruous one, as, out of these claims may very possibly arise a conflict of duty and interest in the way that I have already pointed out.

Judgment.

I do not conceive that any party has a *right* to have the conduct of the proceedings in the Master's office, but that *ceteris paribus* it will be committed to those who have the greatest interest in conducting them properly and economically. I think the relative position of *Andrew* and the executor *William Perrin* is such that the conduct of these proceedings may properly be taken out of the hands of *Andrew*, and committed to one having the interests which the petitioner has; and in saying this I do not impugn the integrity of either. As to the fitness of Miss *Crysler*. If her interests were insignificant I should say that she ought not to be appointed; but if

the estate is of the value that it is represented to be, and if, as is sworn, the members of the other family are illegitimate, her interest will be considerable; and she may, for aught I know, be energetic and capable. Still I should have been better pleased if the conduct of the suit had been committed to an older person, and one having a larger interest in the estate. 1871. Perrin v. Perrin.

I cannot say, however, that the Referee is wrong, and must therefore dismiss the appeal, and it must be with costs.

FITTEN v. DAWSON.

Creditor's suit for administration—Staying proceedings in, before decree on payment of plaintiff's claim and costs—Right of party beneficially interested in estate to make application.

In a suit by a creditor for the administration of his deceased debtor's estate, any party beneficially interested in the estate may apply to stay proceedings on payment of the creditor's claim and costs. The right to do so is not confined to the personal representative.

[November 27, 1871.]

This was an appeal by the defendant *Thomas Dawson* from the order of the Referee, refusing to stay the proceedings and dismiss the bill in this suit, on the application of the appellant. Statement.

The plaintiff was a creditor of one *James Dawson*, who died intestate, and the bill herein was filed against *John Dawson*, his administrator, and *Thomas Dawson* and others, his next of kin and heirs-at-law, alleging that the administrator had got in the personal estate, but that he had not paid thereout the debts of the intestate, but had misapplied the same and appropriated a large portion thereof to his own use, that he had absconded from the Province, and that the other defen-

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dants, as heirs-at-law, were selling or otherwise disposing of or dealing with the real estate of the intestate, and praying for an administration and an injunction against any dealings by the heirs with the real estate.

The appellant applied in Chambers for an order that upon payment of the amount of the plaintiff's claim and costs all further proceedings might be stayed and the bill dismissed. He had previously offered to pay whatever was due on the claim and to submit the question of the plaintiff's costs to the Referee. No decree had been pronounced in the suit. It appeared that prior to making the application the applicant had parted with all his interest in the real estate of the intestate to one *Parsons*.

The Referee refused the application and the applicant appealed.

Argument.

Hodgins, for the appellant, cited *Holden* v. *Kynaston* (*a*), *Pemberton* v. *Topham* (*b*), *Sivell* v. *Abraham* (*c*), *Millington* v. *Fox* (*d*), *Rudd* v. *Rowe* (*e*); and contended that the appellant was entitled to pay the plaintiff's claim and costs and stay proceedings against the estate.

Mr. C. *Moss* (with him Mr. *R. Fraser*), for the plaintiff, contended that the appellant had no *locus standi* to make the application. All the cases cited in support of the application and others of the same kind when examined shewed that the applications were invariably made by the personal representative. He alone was the party entitled to apply, as it was his duty to pay off the debt, and thus *extinguish* the claim against the estate. A payment by any other person would not extinguish the claim against the estate, for that person could him-

(*a*) 2 Beav. 204. (*b*) 1 Beav. 316. (*c*) 8 Beav. 598.
(*d*) 3 M. & C. 338 (*e*) 10 L. R. Eq. 610.

self afterwards maintain a suit against the estate in respect of the payment made by him. To grant the application would only be to transfer the right of suit from the plaintiff to the appellant. 1871. Fitten v. Dawson.

The appellant had now no interest in the estate. The bill shewed that the only assets remaining consisted of the real estate of the intestate, and the appellant had parted with all his interest in this. He was therefore a stranger to the estate; and the Court would not permit a mere stranger to stay the plaintiff's proceedings, and compel the plaintiff to receive payment from him. The appellant would not be allowed to purchase himself into the position of a creditor of the estate.

The offer of the appellant made previous to the application was insufficient. He should have offered to pay all costs including the costs of the other defendants, and the plaintiff was not bound to accept an offer which did not include those costs.

Judgment.

SPRAGGE, C.—I have but little to add to the observations that I made during the progress of the argument. It is true that in the cases cited where proceedings have been stayed in administration suits the application has been by the personal representative; but in this case, as is alleged by the plaintiff himself in his bill, the personal representative has absconded from the Province; and the application is made by a party beneficially interested in the estate.

I cannot doubt that in a proper case the application may be made by a party beneficially interested. The suit is by a creditor for a small sum compared to the value of the estate. The only legitimate object of the suit is to obtain payment. Conceding that a mere stranger could not force payment upon the creditor, though a refusal to receive it even from a stranger would

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be vexatious, I can conceive no good reason in the mouth of the creditor for refusing to receive payment from one who is interested in exonerating the estate from the debt, and saving it from the expenses of its administration in a Court.

It is said, however, that the defendant has no interest. It is not shewn that he has not; for, assuming that he has parted with all his interest in the real estate, the personal estate is stated in the bill to be of the [value of over $3,000, and it does not appear that none of it is available. The bill only alleges that the administrator received and got in the personal estate; but that he did not therewith pay the debts of the intestate or otherwise properly apply the same; but misapplied the same; and appropriated a large portion thereof to his own use. It could not be said even if this allegation were proved, which it is not, that the next of kin had no interest in the personal estate.

Judgment.

Then it is urged that what the defendants applied to do, would be only a transference of this debt from one plaintiff to another *i. e.* to himself, and that he might himself institute a suit for the administration of the estate. Possibly he might; but he would certainly stop this suit, and he only *might* bring another; and it by no means follows that he can do so. It was said in argument that the applicant had demanded an assignment of the debt. I do not find that he did so, either in his offer of the 18th of September, or in his notice of motion. In the former he said nothing about it: in the latter he asks only that, upon payment, the note be handed over to him.

The plaintiff has no right to assume that this applicant is acting officiously in the matter, or that he makes the application from any improper motive, or with any improper object. He appears to me to trouble himself

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unnecessarily in a matter that does not concern him, and to interpose obstacles to what does appear to me a very reasonable request. The observations of Lord *Langdale* in *Holden* v. *Kynaston* are so appropriate to this case that I cannot do better than quote them. The bill was, like this, by a creditor for the administration of an estate. The debt was on a joint and several promissory note given by the intestate and two others, and the application was by the two others to dismiss the bill. Lord *Langdale* said, "I confess I think that where a debt is claimed or demand made in a suit, and the defendant, admitting his liability, offers to pay the debt or comply with the demand, and to put the plaintiff in the same situation as he would have been in if that liability had been satisfied without a suit, it is the bounden duty of this Court to put a stop to any further proceedings; and I shall never hesitate unless I am controlled by higher authority to comply with an application of that sort."

Judgment.

It is objected further that there is no offer to pay all the costs of the administration suit, but only an offer to submit the question of costs to the Referee. It is so in the offer of 18th September. The notice of motion is for an account to be taken of the debt and interest and "such costs as the plaintiff may be considered entitled to in respect of said note, and which would form a lien on the said lands in question in this cause." I confess I do not very well understand what is meant as to the costs; but the notice concludes with asking for such other order as the Referee or a Judge might deem just. I think in this there was a submission to pay all such costs as the plaintiff might be found entitled to receive; and that it would comprehend costs, if any which the plaintiff might have to pay to the other defendants, as well as the plaintiff's own costs of suit. If the plaintiff was otherwise entitled to what he

(*a*) 2 Beav. 204.

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asked, and his offer as to costs was ambiguous, the proper course would be not to refuse his application but to make it a term of granting it that he should pay all such costs as it was proper that he should pay.

I do not find that any particular formality is required in regard to the offer to pay costs. In *Pemberton* v. *Topham* (*a*), the offer was on payment of debt and interest, "together with costs of suit to be ascertained by the Master." The language of the Master of the Rolls, in *Sivell* v. *Abraham* (*b*), also makes this clear. It is clear also from this general principle of the Court, of which the case of *Millington* v. *Fox* is an illustration that where in the progress of a suit an offer is made by a defendant which gives to the plaintiff all that he is entitled to, he ought not to proceed; and if he does so, he will at all events not have his costs. If this matter of costs had been the only one before the learned Referee I think he would not have refused the application. I understand that he refused it on the ground that the applicant had no *locus standi* to make the application. In this I am unable to agree with him, for reasons which I have endeavored to explain.

Judgment.

I think the application should have been granted without costs. I should have been inclined to say with costs, if the offer of the 18th of September had been as clear and explicit as it might have been.

(*a*) 1 Beav. 316. (*b*) 8 Beav. 594.

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Re Scott.—Scott v. Burnham.

Costs—Retaxation—Style of proceedings.

Although the Courts will interfere and order a retaxation of costs, even after a judgment has been obtained for them when the overcharges are gross and excessive, yet a client must come promptly, more especially when the relationship of solicitor or client has ceased to exist, to obtain such relief, and it will not be granted if the amount overpaid is small.

Where the alleged excess overpaid was only $15, making about one-twelfth of the whole bill, and the application was not made until after great delay; the Referee refused an order for retaxation, and his decision was upheld on appeal.

The proper style of proceedings in such a matter is in the matter of the solicitor only, without the style of any cause.

[December, 1871.]

Statement.

This was a petition by a client for the taxation of a solicitor's bill, presented after very considerable delay. The bills of costs were rendered sometime in the latter part of 1869, an action at law was brought by the solicitor to recover the amount in the January following, a verdict was obtained in June, and the judgment was entered up in July, 1870. Subsequently a bill was filed in this Court by the solicitor, seeking to set aside a conveyance made by the client as fraudulent, and for the purpose of defeating his judgment. This suit was at issue.

The present petition was styled in the matter of the solicitor, and also of the suit to set aside the alleged fraudulent conveyance, and prayed a taxation of the bills, and a stay of the suit pending the taxation.

Messrs. *Crooks, Kingsmill, and Cattanach*, for the petitioners.

Mr. *Hodgins* contra.

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MR. TAYLOR, REFEREE IN CHAMBERS.—The style adopted is not, it seems to me, the proper mode of styling the papers in such a matter. It has been adopted, I suppose, from analogy to the practice at law, where on an application is to tax an attorney's bill upon which an action brought, and for a stay of proceedings pending the taxation, the affidavits, summons, and order, are styled in the matter of the attorney and of the action (*a*). This, however, is necessary to obtain the stay of proceedings. In this Court it is not necessary, indeed would be improper, on a bill for an injunction to stay an action at law, to introduce the style of the action into the style of the cause. On an application by a client to tax his solicitor's bill, even when obtained on *præcipe*, it is of course, to stay all proceedings at law pending the taxation, and if proceedings at law could be thus stayed, surely another proceeding in this Court could in a proper case be dealt with in the same way.

Judgment.

I do not see what right the petitioner has to apply in this suit of *Scott* v. *Burnham* for a taxation of these costs. It is not a suit brought upon the bills of costs, it is to enforce a judgment at law. It is true the judgment was recovered upon these bills, but the original cause of action merged in the judgment when recovered. What right has the defendant to apply before the hearing for a reference to ascertain the true amount for which the judgment should have been entered up here, any more than if the judgment had been one recovered upon a promissory note, or for goods sold and delivered. If the application is made in the cause I can see no authority on which it can be sustained. If it is made under the Statute (*b*), then it should have been styled in the matter of the solicitor only.

As this is however merely matter of form, the petition being in fact styled both in the matter of the solicitor

(*a*) Chitty's Forms. (*b*) Con. Stat. U. C. ch. 85.

and of the cause, I am unwilling to dispose of the motion upon a mere technical ground, and one which could be remedied by amendment if substantial justice required it, so I have considered the petition upon its merits. It has been said that applications like the present should be construed liberally for the client. (*a*) The facts as they appear from the petition and affidavits, are, that the bills of costs were rendered about October, 1869, the action on them commenced in January, 1870, and the judgment recovered in July, 1870. It is admitted for the petitioner that special circumstances must be shewn to entitle her to a taxation. The special circumstances on which she does rely are, that when the bills were rendered she was an infant, in a foreign country, sick in hospital, without advice, and without money to obtain it. Gross overcharges and fraud are also alleged.

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There is no doubt as to the truth of the facts alleged, at least they are not denied, that she was at the time when the bills were rendered, an infant, in the United States, away from her friends, and in ill health. She was also abroad when served with the writ of summons in the action brought upon these bills. But it is alleged on the other hand, that she was in Canada, and in fact had advice, respecting these bills, at least fifteen months before making the present application. She is the executrix and sole devisee under the will of her aunt, Mrs. *Hill;* and as executrix proved the will in October, 1868, being then over seventeen years of age. The 38 Geo. III. ch. 87, not being in force in this Province, an infant may, at 17, be an executor (*b*). The business in respect of which the bills of costs were claimed as due, was business done for Mrs. *Hill* or for Miss *Archer*, as her executrix, and the action was against her as

Judgment.

(*a*) Williams v. Griffiths, 10 M. & W. 125; Engleheart v. Moore, 15 M. & W. 548, and re Walton 4 K. & J. 78.

(*b*) Swinb. p. 5, sec. 1; Nash v. McKay, 15 Gr. 247.

1871. executrix. I presume that if she could at seventeen be executrix, she was liable to be sued as such.

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The only cases which I have been able to find where applications like the present have been made after judgment are, *Re Gedye* (*a*), *Re Barnard* (*b*), and *Re Whicher* (*c*); but the cases after payment are numerous, and seem to afford sufficient analogy. "Pressure accompanied by some overcharge," or "overcharge amounting to evidence of fraud"—*Re Strother* (*d*)—must be shewn to induce the Court to interfere, it is said.

Numerous cases were cited, but none of them are analagous to the present. In *Nokes* v. *Wharton* (*e*), the bills of costs were delivered, the client had advice respecting them, and as the result of the examination and discussion about the bills, an abatement was made by the solicitors, yet a taxation was ordered, the relationship of solicitor and client continuing till after the payment. The Master of the Rolls thought that the client was, to an alarming extent, in the power of the solicitors; that the bill which contained general items to a very considerable amount, under the terms "numerous attendances" and "innumerable attendances," was not sufficiently explanatory; and that the solicitors did not do all, which under the circumstances they ought to have done, to facilitate to the client the exercise of his right to a full statement of the particulars of the charge, and to the proper investigation of each particular item.

Judgment.

Re Wells (*f*) was a case, where, on paying off a mortgage, the mortgagee's solicitor produced his bill of costs and insisted, though items were objected to, upon payment by the mortgagor as a condition for immediate completion of the transaction. There taxation was

(*a*) 15 Beav. 254.
(*b*) 2 D. M. & G. 359. 549.
(*c*) 13 M. & W. 549.
(*d*) 3 K. & J. 518.
(*e*) 5 Beav. 448.
(*f*) 8 Beav. 416.

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ordered, Lord *Langdale* saying the "first special circumstance" is, that the bill was delivered at a time when it was impracticable, according to the nature of the transaction, to submit it to a satisfactory examination before it was paid; the second "special circumstance" is this: that, with such means of examining the bill as the parties then had, material items were pointed out and objected to, so that the party received payment with knowledge that the items were objected to; and the third "special circumstance" (in the absence of which I never order a paid bill to be taxed) is, that there are apparent overcharges. It is worthy of observation that the bill in that case amounted to £19 1*s.* 10*d.*; items amounting to £6 11*s.* 8*d.* were objected to as overcharges; but the result of taxation was, that £2 4*s.* was taken off, while the costs of the taxation were taxed at £43 9*s.* In *Re Abbott* (*a*) taxation of a bill was ordered fourteen months after payment, the fact being, that on effecting a loan, the mortgagor (a lady) and her solicitor met the mortgagee's solicitor to complete the transaction, when the money was paid by three cheques, one of which was handed to the mortgagor's solicitor, who retained it for his costs, his bill being at the same time handed to his client in a sealed packet. The Master of the Rolls in that case considered from the evidence before him that, though there was no suspicion of any undue influence, there was the necessary influence which exists between a solicitor and his client, besides this species of pressure, that it was certain that the transaction would come to nothing, unless the client consented to the payment. *Re Williams* (*b*) was a case where taxation was ordered of an unpaid bill eighteen months after its delivery, the bill having been demanded in 1848 but not delivered until January, 1850, just as the client was leaving the country; no steps having been taken to enforce payment in the meantime.

Judgment.

(*a*) 18 Beav. 393. (*b*) 15 Beav. 417.

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All the cases which I have examined, and they are numerous, are similar to the foregoing. They are all cases where the relationship of solicitor and client existed at the time of the payment, and continued for some time after, or cases where a mortgagor paying off a mortgage, the mortgagee's solicitor being entitled to costs required immediate payment of his bill as a condition to the completion of the transaction. Now no such state of circumstances can be pretended to have existed here. The bills have not been paid, and it cannot be said that the client did not defend the action through fear of her solicitor. The relation of solicitor and client between Mr. *Scott* and Miss *Archer* had ceased to exist before the bills were rendered. It is true she says in her petition, though she does not in her affidavit, that, when the writ of summons was served upon her, she was not aware of the legal effect of it; but she was not at that time unacquainted with litigation. She and Mr. *Scott* were at arms' length, for before this she had commenced, and been prosecuting a suit in this Court against him to set aside a conveyance of some land which he had obtained from her, and a decree in her favour had been made some months before the bills were rendered. That the solicitor took legal proceedings to enforce payment of the bills of costs cannot be called pressure such as has been held sufficient to warrant the ordering of a taxation.

Judgment.

It was said in *Re Browne* (*a*), that the pressure must have been of such a kind as to have rendered it impossible or difficult to have had the costs taxed before payment and in the ordinary course. In *Re Barrow* (*b*), and *Re Mash* (*c*), the Master of the Rolls said that the doctrine of pressure, in cases of taxation after payment, is not to be extended.

(*a*) 1 D. M. & G. 322.

(*b*) 17 Beav. 547.

(*c*) 15 Beav. 88.

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Besides, the cases already remarked on and others of a similar class, have been held not to apply where the client had an opportunity of examining and taxing the bill. Thus three weeks, a fortnight, and even one week, has been held sufficient opportunity. (*a*) Now in this case the bills were delivered in the latter part of 1869. I assume the petitioner's statement to be correct, that at that time she was in the United States, in ill health, poor, and unable to obtain or pay for advice, and that this state of things continued at the time she was served with the writ of summons, in January, 1870. However, in July, 1870, she was in Peterborough. This fact she does not mention in her first affidavit, nor does Mr. *Burnham* in the affidavit he originally made, but in a subsequent affidavit made by Mr. *Burnham*, he states this fact, saying that his attention had been called to it by Mr. *Scott*, and that when he drew Miss *Archer's* affidavit he had forgotten the circumstance. From Mr. *Burnham's* second affidavit and his cross-examination in this matter, it appears that when Miss *Archer* was in Peterborough, in July, 1870, she shewed him the bills of costs, but not the writ of summons. In his affidavit he says he advised her to get the bills taxed, but that more than a month having elapsed, she could not do so of course, and that she had better wait and see whether Mr. *Scott* sued her on them. Soon after she left, he heard that Mr. *Scott* had sued; and he wrote to her, when she sent him the writ of summons. In his cross-examination he says, he advised her to get the bills taxed, as he had no doubt Mr. *Scott* would proceed against her to collect them. Since then nearly sixteen months have elapsed, during which no step has been taken for the taxation of these bills, and it is only when the suit instituted by *Scott*, and to which *Burnham* is a defendant, to set aside an alleged fraudulent conveyance

Judgment.

(*a*) Re Harrison 10, Beav. 57; Re Neate, Ibid 181; Re Drew, 10 Beav. 368; Re Welchman, 11 Beav. 319.

1871. Re Scott. by Miss *Archer* to *Burnham*, is at issue, and almost about to be heard, that any application for taxation is made. I do not see how I can, under all these circumstances, order a taxation on the ground of pressure.

Over charges amounting to evidence of fraud are however relied on as justifying an order for taxation. Before remarking on the items of alleged overcharge pointed out, one observation is not out of place. Mr. *Elias Burnham* was solicitor for *Thomas Stothert*, the father of Mrs. *Hill*, and for Mrs. *Hill*, the aunt whose executrix and sole devisee Miss *Archer* is. Mrs. *Hill* was the executrix of *Stothert*. Mrs. *Hill* afterwards became the client of Mr. *Scott*, and Miss *Archer* on her death became his client. He conducted apparently a number of suits for them; but after a time Miss *Archer* became a client of Mr. *Elias Burnham*. He is not her solicitor in this matter, but his son (the old gentleman having in the meantime retired from practice). The latter, however, continues as he says, to advise Miss *Archer* as an old friend, and occasionally assisting his son in his office, the affidavits in this matter have been prepared by him, he being, as he says, better acquainted with the facts. Now it is somewhat curious that while there is a general allegation that the bills of costs rendered by Mr. *Scott* contain charges not warranted by the practice of the Court, and are exorbitant and improper, the only specific items of overcharge mentioned in the petition are in connection with proceedings taken by Mr. *Scott* to enforce the delivery by Mr. *Burnham*, and the taxation of bills of costs which he claimed against the late Mrs. *Hill*.

Judgment.

The total amount of Mr. *Scott's* bill of costs was $189.74. The items of overcharge in connection with the application for taxation of Mr. *Burnham's* bill, which is said to have been "an order for delivery and taxation of a solicitors bill without special circumstances" are as follows:

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1. "Consultation and opinion as to the proceedings in Chancery to compel delivery of bills of costs 25*s*.

2. "Instructions for affidavit of petitioner 5*s*.; 10*s* for general instructions having been before charged. This, of course, is a charge not warranted by the tariff, but it is one which I believe it is the general opinion of solicitors should be allowed by any new tariff which may be settled by the Court.

3. "Two affidavits, one of eight folios and the other of five folios, to support the petition, with copies to file and serve, when the short affidavit would have sufficed, and two further affidavits of the same parties, which the said *W. H. Scott's* agent informed him were necessary, and which should not have been charged at all, besides unnecessary charges for letters, attendances, and filings connected therewith."

4. "Charges connected with service on the solicitor of notices of filing the petition, of serving him with the petition and copies of affidavits, which were unnecessary."

Judgment.

5. "Charges for brief on the motion, amounting to £1 2*s*. 6*d*."

6. "Charges for numerous attendances in Chambers on the application for the order and attending for judgment, and counsel fee, which were unnecessary and improper."

7. "Charges for notice of motion in the Master's office, and for affidavits, fees, and attendances there."

8. "Fee on settling petition for order for delivery of bills, 10*s*.; attending the counsel with and for, 5*s*.; letters to and from agent and to petitioner, on receiving letter from agent that affidavits were not sufficient, 7*s*. 6*d*.; besides postages. Total, £1 2*s*. 6*d*."

9. "Fee, drawing bill to serve on his own client, and copies, 10*s*."

10. "For attendances and counsel fee, and disbursements in the Master's office, which are fictitious."

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Now the first of these items may or may not be a proper charge. It and also the 3rd, 4th, 6th, and 8th, are, I suppose, objected to because the application for the delivery and taxation of Mr. *Burnham's* bills was, as it is said, "an order for delivery and taxation of a solicitor's bill without special circumstances." Was this the case? I have looked over the papers filed, and refreshed my recollection of the application which was made before me, and I find that it was not as alleged. The petitioner, Mrs. *Hill*, then Miss *Stothert*, could not have got on *præcipe* or upon an *ex parte* application in Chambers, the relief she sought and obtained. Mr. *Burnham*, the solicitor, resisted the application, and filed affidavits in opposition to it. That being the case it is evident that it was necessary to file affidavits in support of the petition, and also to serve it upon the solicitor. As to the "numerous attendances in Chambers, attending for judgment and counsel fee, which were improper and unnecessary," I find only three attendances in Chambers charged, two being enlargements. These were at *Burnham's* request, that he might have time to file his affidavits in answer. The counsel fee charged is 10*s*., this being just the fee allowed by the tariff where counsel argue a motion. As to 7 and 10, it is alleged that, after delivering the bill, the taxation was never proceeded with by *Scott*, but that Mr. *Burnham* took the matter up and proceeded to tax the bills. Mr. *Scott*, on the other hand, says the services and the disbursements charged were performed and disbursed by him; that the matter of *Re Burnham* was contested in the Master's office, notwithstanding *Burnham's* denial; and that the services charged in that matter were all rendered. Now, I do not think I should, where there is only oath against oath, impute to a solicitor such grossly dishonest conduct as making out a bill of costs, charging services and disbursements never rendered nor paid. The onus of proving the overcharges rests on the petitioner (*a*).

Judgment.

(*a*) Re Towle, 30 Beav. 170.

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Re Scott.

The item of 5*s.*, instructions for affidavit, I have already remarked is one not warranted by the tariff. The item of 10*s.*, settling petition, and of 5s., attending counsel, are improper, the petition not having been in fact settled by counsel. So is the charge of 10s. for drawing and serving bills on the client. These items of overcharge pointed out in the petition, and which I think are improper, amount in all to $15, less than one-twelfth of the bills rendered.

In *Re Drake* (*a*) a petition was presented after payment, but within twelve months, praying taxation of a bill of £11, and alleging overcharges amounting to £6 14*s.* 8*d.*, which was discharged, but without costs, the Master of the Rolls not being satisfied that the charges were proper. In *Re Towle* (*b*), a bill of costs amounting to £130 8*s.* 4*d.* was paid on the 14th of June, and on the 17th of July following a petition was presented for taxation, alleging £89 6*s.* 6*d.* as overcharges; but Lord *Romilly* dismissed the petition, the petitioner having had fourteen days between the delivery of the bill and its payment, within which to examine it.

Judgment.

All these are cases of application made after payment. The cases after judgment are few in number, but seem strong against the right to taxation. In *Re Cooper* (*c*), an attorney having been sued in a County Court, pleaded bills of costs as a set-off. The suit came before the Judge on the 28th of March, and he reserved his judgment till the next Court day, 25th of April, when he gave judgment for the attorney. In the interval, and on the 20th of April, an order for taxation was obtained by the plaintiff, the client, and the Court of Common Pleas refused to set it aside, saying, the Judge of the County Court would reduce the judgment, if such should be the result of the taxation. There the taxation was ordered before judgment, and

(*a*) 8 Beav. 128. (*b*) 30 Beav. 170. (*c*) 14 C. B. 663.

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Re Scott.

while the action was pending, a matter of every day occurrence. *Re Gedye* (*a*), seems to decide that a judgment by default does not preclude an order, even of course for taxation. The Court of Exchequer, however, took a different view. In *Re Whicher* (*b*), the bill of costs was rendered in 1843, a writ sued out in August, 1843; judgment by default and *fi. fa.*, 3rd November following. The application for taxation was made on 4th November, 1844. Chief Baron *Pollock*, in giving judgment (in which the other Barons concurred) said: "The 'special circumstances' under which the Court will interfere after verdict, should be some new matter which has come to the knowledge of the party, who should shew that he has used due diligence in applying to the Court on learning it. In this case there is no fact stated of which the plaintiff was not fully aware nearly a year ago, and after acquiescing for so long a time I think the Court ought not to interfere."

Judgment.

The present case is not one of a judgment by default but on a verdict. The writ was not specially endorsed, and was served out of the jurisdiction. *Re Gedye* appears to be overruled by *Re Barnard*. There the Master of the rolls having ordered a taxation after judgment signed for default of a plea which was final, the order was appealed to the Lord Justices and was reversed; Lord Justice *Knight Bruce* saying, it is true that the letter of the Act of Parliament (and the wording of our Act is the same as that of the Imperial Act) only mentions the cases of a verdict having been obtained and of the execution of a writ of inquiry, and the judgment in the present case was obtained by an action in which there was no writ of inquiry, and in which there was no verdict. But whatever the letter of the Statute may be, I am of opinion that it will not exceed the bounds of just interpretation to hold, that, according to its spirit the

(*a*) 15 Beav. 254. (*b*) 18 M. & W. 549.

enactment includes this case, although there has been neither verdict nor writ of inquiry. There has been more than either, without special circumstances there can be no taxation in any judgment." What special circumstances would be sufficient appear from the judgment of Lord *Cranworth*, who said "the circumstances must be such as to afford a reasonable excuse for not applying sooner, not circumstances of which the client could reasonably have availed himself before." 1871. Re Scott.

In that case it was said to be not clear, that mere overcharge could in the absence of fraud amount to a special circumstance. Now here what facts or circumstances are even alleged to have come to the knowledge of Miss *Archer* which she could not have availed herself of at least sixteen months ago? None.

The only other ground upon which it was sought to obtain a taxation, and which is relied upon as proving fraud, is the omission by the solicitor to give credit for two sums of $25 and $56, received by him on account of these costs. These sums there is no doubt the solicitor received, and should have given credit for. I am not satisfied with the explanation given by the solicitor of how these came not to be credited. The first was paid him only a few days before the bills of costs were made out, and the second was paid him about two months before he obtained the verdict, and under peculiar circumstances, which would, I should think, have fixed it in his memory. It is not however necessary to direct a taxation of the costs, that Miss *Archer* may obtain credit for these payments. The solicitor admits that he received these sums by his affidavit, and if that is produced at the hearing in *Scott* and *Burnham*, and used as an admission by him, the Court may either by the decree declare that the judgment should be reduced by these sums, or direct the Master to enquire what credits the defendant is entitled to. Judgment.

1871.

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The petitioner having failed to shew such circumstances as would warrant any ordering a taxation after judgment, and a taxation being unnecessary for the purpose of the petitioner obtaining credit for the two sums received by the solicitor, I must dismiss the petition; but as there are overcharges, though not sufficient to warrant a taxation at this distant day, and the solicitor's explanation why the proper credits were not given is not quite satisfactory, I dismiss it without costs.

From the foregoing decision of the Referee appeal was had on the part of the petitioner, which came on to be heard on December 4th, 1871, before Vice Chancellor *Mowat*. Mr. *Cattanach* appearing for the appellants. He urged that the bill of costs contained gross overcharges and omissions of items of credit, and pointed these out, going over the figures, and contended that they constituted "special circumstances" sufficient to open up the judgment and obtain a retaxation. He referred to Consol. Stat. 420, secs. 29–30.

Judgment.

THE VICE CHANCELLOR mentioned a case of *Fleming* v. *Duncan* (*a*) where it had been held that if the relation of solicitor and client still existed, the Court would, where the circumstances warranted it, still interfere, even after judgment had been obtained for the amount of the bill claimed.

Mr. *Hodgins*, contra, relied on *Re Bernard* (*b*).

MOWAT, V. C.—I think I should not enter into a detailed examination of the items of the bill of costs complained of It appears that there are overcharges to the amount of fifteen dollars only, being about one-twelfth of the whole bill, and considering the long delay which

(*a*) 17 Grant 76. (*b*) 2 D. M. & G. 359.

has taken place I do not think I ought to let the petitioner in to retax the bill. If the amount overcharged had been large, I should have considered it right to order a re-taxation: as to the sum of $71 received by Mr. *Scott* before judgment and not credited until afterwards, it appears that Mr. *Scott* has always been willing to allow it. Miss *Archer*, the petitioner, was not herself to blame for the delay; but her former solicitor, Mr. *Burnham*, who should have put in a defence for her at law, did not communicate to her that he was not in practice at the time, having assigned his business to his son, but left her to assume he was still acting as her solicitor. 1871. Re Scott.

The order should recite the payment of the above sum of $71, and that the respondent undertook that the same should be set-off against the judgment. With this variation I dismiss the appeal with costs, without prejudice to any application which Miss *Archer* may be advised to make against Mr. *Burnham* in respect of the costs to be paid to the respondent, or in respect to Miss *Archer's* own costs of the application in Chambers and of this appeal. Judgment.

SPOONER v. JONES.

Title—Notice of assignment for benefit of creditors.

The mere fact that certain creditors had notice of an assignment, without some act on their parts equivalent to an accession to the trusts in the deed, or such as would prejudice their rights, does not make the deed irrevocable.

Where a deed had been made in trust for creditors to a party who afterwards reconveyed to the grantor, some of whose creditors had been informed of such assignment having been made, but had done no act to alter their position in any way, and the land was afterwards sold for taxes; it was *held*, that the deed of assignment was revoked and did not affect the title.

[Master's Office, October, 1871.]

The question raised was in a suit for specific performance under a reference to the Master to inquire if a good

1871. Spooner v. Jones.

title could be made. The land was at one time vested in one *Shortiss* and by him conveyed to one *Way* in trust for creditors, and a reconveyance afterwards made to *Shortiss*, under the circumstances detailed in the judgment. While the title was in *Shortiss* under the reconveyance, the premises were sold at Sheriff's sale and bought by the defendant under *fi. fa.* It was objected by Mr. *Morphy* for the plaintiff that the title was defective by reason of the outstanding interest of the creditors of Mr. *Shortiss* under the composition deed.

Mr. *Blake*, for the defendant, produced evidence which is set forth in the judgment; and cited *Garrard* v. *Lauderdale*, and other cases referred to in the judgment.

Judgment

MR. BOYD, MASTER IN ORDINARY.—*Garrard* v. *Lauderdale* (*a*) is a case which has been much discussed, and expressions of the Vice Chancellor therein have not been received with favour in late cases. The decision in that case must be taken to be limited to this: that an assignment by a debtor to a trustee for the benefit of creditors who should come in and execute the deed is revocable by the debtor, in case no one of the creditors has executed, or in any degree assented to the deed. In *Harland* v. *Binks* (*b*), per *Wightman*, J., that learned Judge states his opinion to be that if any creditors have been put in such a position by the communication of what has been done by the debtor, that their rights may have been altered, then the deed is not revocable, at least not without the consent of those creditors, whose rights may have been affected, and an option given to them to come in or decline doing so. In *Harland* v. *Binks* (*c*), there was a communication to five of the creditors separately, by the trustees, and they expressed themselves satisfied with the arrangement, and the Court considered that

(*a*) 3 Sim 1. (*b*) 15 Q. B. 720. (*c*) Ib. 721.

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they might in consequence of the communication have refrained from pursuing their legal remedies, or altered their position in consequence of the deed being executed in their favour. In *Siggers* v. *Evans* (*a*), the Court seems to approve of Mr. Justice *Wightman's* views in the earlier case, and after a review of the authorities, it is expressly left undetermined in that case, whether, in order to render a conveyance of the kind in question irrevocable, there must be an actual assent of the creditors, or whether the communication to the creditors, or some of them, is not sufficient. Now, in the present case, there was a communication of the deed not only to Mr. *J. Hillyard Cameron*, who executed it, but a knowledge of it by the other creditors. Mr. *Way* states what occurred thus: "one or two creditors came to me after the assignment, to know when I was going act, but as I could get no papers I could not act." He does not say that he told this to the inquiring creditors: but it appears that he afterwards advertised in the papers that he could do nothing under the deed, and that he was going to execute a reassignment. This was in two Toronto papers, and no creditor objected. Mr. *J. Hillyard Cameron* was the legal adviser of the trustee, and suggested this mode of getting rid of the trusts which Mr. *Way* adopted. As far then as this creditor is concerned there is no difficulty, as he manifestly consented to the trusts being revoked.—(See per *Burns*, J., in *Burritt* v. *Robertson* (*b*). But what as to the other creditors who knew of the assignment, and made inquiries respecting the time when the trustee was going to act under it? Now it is not stated whether the trustee or the debtor communicated the fact of the execution of the assignment to these and the other creditors, nor does it appear whether the trusts of this instrument were registered *in extenso*. If the creditors merely heard of it casually, without communication made

Judgment.

(*a*) 5 E. & B. 377.

(*b*) 18 U. C. R. 562.

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to them by the debtor or the assignee, then according to Lord *St. Leonards's* opinion in *Law* v. *Bagwell* (*a*), it is probable that the knowledge of the deed, would of itself, be an immaterial circumstances.—(See *Gibbs* v. *Glamis* (*b*), *Bill* v. *Cureton* (*c*). If, however, notice of the trust deed was communicated by Mr. *Shortiss* or Mr. *Way*, there seems to be no case deciding the precise point, but great difference of opinion is to be found as to whether the deed would be revocable after such communication. In *Garrard* v. *Lauderdale*, *Shadwell*, V. C., thought the fact of communication an immaterial circumstance. In *Acton* v. *Woodgate* (*d*), the Master of the Rolls, Sir John *Leach*, referring to this *dictum*, says: "It appears to me that this doctrine is questionable, because the creditors being aware of such a trust, might be thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised." With this view Sir *E. Sugden* expressed his concurrence in *Browne* v. *Cavendish* (*e*), adding, "but in stating this, I do not mean to bind myself to hold that, in every case, a representation to a creditor will give him the benefit of the trust. *It must depend on the character of the representation, and the manner it is acted on.* On the other hand I should be sorry to have it understood that a man may create a trust for the benefit of his creditors, communicate it to them, and obtain from them the benefit of their lying by until, perhaps, the legal right to sue was lost; and then insist that the trust was wholly within his own power."

Judgment.

In *Kirwin* v. *Daniel* (*f*), *Wigram*, V.C., adverted to the language of *Shadwell*, V. C., and said that it was a material consideration that though notice may not alter the effect of the deed, it may alter the position of the creditor, and he refers to cases at law,

(*a*) 4 Dru. & Warr. 406 (*b*) 11 Sim. 584. (*c*) 2 M. & K. 503.
(*d*) 2 M. & K. 492. (*e*) 1 J. & Lat. 606. (*f*) 5 Ha. 499.

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shewing that where a creditor, on whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for and a debtor to that creditor, these cases being decided on the ground that the creditors may on the faith of the notice, have forborne to sue. The same Judge in *Griffiths* v. *Ricketts* (*a*), held that the assignment would not be revocable as against any creditors with whom such communications had taken place, as would give them an interest under the deed, but at utmost, would be revocable only as to the surplus proceeds of the estate after satisfying such creditors; and whether the deed was revocable as to the surplus at the option of the assignor, *quære.* In *Goodeve* v. *Manners* (*b*) *Spragge*, V. C., said: "I think it must be held at the present day, that a trust deed communicated to creditors is not revocable." In that case the deed had been carried round to the creditors, and was registered with all the trusts *in extenso.* In *Synnot* v. *Simpson* (*c*), it is said by the Lord Chancellor, "If the debtor give to the creditors notice of the existence of the deed, expressly or impliedly tell them that they may look to the trust property for payment of their demands, they may thereby become *cestuis que trust.*

Judgment.

On the other hand Lord *Cranworth*, in *Montefiore* v. *Browne* (*d*), said in giving judgment: "In some of the cases it has been held that if the existence of the trust has been communicated to the creditor, the deed is no longer revocable. Whether that is correct without considerable qualification I need not discuss." In *Smith* v. *Keating* (*e*), in the Exchequer Chamber, *Parke*, B., seems to doubt whether the mere communication would render the instrument irrevocable. The question was

(*a*) 7 Ha 299, 1849.
(*b*) 5 Grant, 181, 1854.
(*c*) 5 Ho. L. C. 188.
(*d*) 7 Ho. L. Ca. 266.
(*e*) 6 C. B. 136.

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discussed and left open by the Court in *Siggers* v. *Evans* (*a*) but with an inclination in favor of *Wightman*, J.'s, opinion in *Harland* v. *Binks*, viz: that a communication of the trust, by reason of which the creditor may not have pursued his remedy, or his position may have been altered, was sufficient to make the deed no longer revocable.

In *Nicholson* v. *Tutin* (*b*), Vice Chancellor *Wood* says the Court requires to be shewn that the creditor has acted under the deed. In *Cornthwaite* v. *Frith* (*c*), it was held that mere communication to the creditors was not enough, but that there should be some act or conduct of the creditor which is equivalent to an accession to the trusts of the deed. So in *Gould* v. *Robertson* (*d*), a correspondence had passed between the trustee and the creditor, but it was held that this did not give the creditor the position of a beneficiary as he had not acceded to the trusts, but rather relied upon his mortgage security, and after a lapse of some years the Court refused him leave to come in. In *Forbes* v. *Limond* (*e*), Lord Chancellor *Cranworth* held that a creditor cannot be said, in any sense to have acceded to the provisions of a composition deed unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed.

Judgment.

I incline to think that the weight of authority is in favor of the position laid down by Lord *St. Leonards*, that the solution of the question depends on the character of the representation, and the manner it is acted on by the creditor. The evidence here does not shew how the creditors making inquiries were informed of the deed—their visit to the trustee did not result in their acceding to the trusts contained therein, and it does not appear

(*a*) 5 E. & B. 877 (1855).
(*b*) 2 K. & J. 18 (1855).
(*c*) 4 DeG. & Sm. 552.
(*d*) 4 DeG. & Sm. 509.
(*e*) 4 DeG. M. & G. 298 (1854).

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that their position was in any way prejudiced by their knowledge of it,—holding, as they did, landed security for their debts. In fact, it does not appear that they acted under the deed in any way. As far as the assignor is concerned, it seems tolerably clear that he never intended the trusts of the deed to be carried out, he never put the trustee in a position to be able to do aneything thereunder. It was a transaction intended rathdr for his own convenience, not for the benefit of his creditors: see *Smith* v. *Hurst* (*a*). The creditors did not put themselves in the same situation with regard to the debtor as if they had executed the deed, nor did they alter their position, so far as the present evidence shews, and therefore they cannot be in the position of *cestuis que trust* thereunder.

Then it appears that notice was given of the intention to revoke the deed—that this was done by reconveyance eight months after the assignment was executed—that a period of nearly twelve years has elapsed since then, and no complaint has been made, no action taken by any creditor, so that the lapse of time, according to the doctrine of *Gould* v. *Robertson* (*b*), where the delay was only half as great, would bar their right to apply to the Court for leave to come in under and execute the composition deed.

Judgment.

Griffith v. *Ricketts* (*c*) leaves it doubtful whether after any creditor has executed, and he is satisfied, the instrument can be revoked by the assignor as to the other creditors. But it was thought, in *Harland* v. *Binks*, *Siggers* v. *Evans* and *Burritt* v. *Robertson* (*d*), per *Burns*, J., that if the creditor who had executed assented, then the deed of assignment was revocable. And that is in effect the present case.

Upon the whole, I think a good title is shewn as against the single point of difficulty raised.

(*a*) 10 Ha. 30. (*b*) 4 DeG. & Sm. 509. (*c*) 7 Ha. 307. (*d*) 18 U. C. R. 562.

1871.

RUSSEL v. BRUCKEN.

Order 560—Construction of.

A motion for leave to appeal from a Master's report after the time limited has expired, need not be made before a Judge.

[December 19, 1871.]

Mr. *McLennan* applied in Chambers before the Referee for leave to appeal from a Master's report, notwithstanding the time limited for appealing had expired, and was stating the grounds on which he moved when the Referee suggested that such a motion must be made before a Judge in the first instance.

Argument.

McLennan contended that Order 560 was so framed that a motion of this kind might be made before the Referee. He was not to know, and was not bound by what was in the breast of a Judge when the order was framed. What he had to consider was, what was the proper construction of the order. This was not a case of importance, or a motion for leave to appeal to the Court ot Appeal. The order does not express that it applies to motions for leave to appeal from the Master and the assumption is in the absence of any express provision, that it does not apply to cases of that kind, the order clearly applies to Court of Appeal cases, and the inference is that it does not apply to the other class.

Mr. *Foster*, contra. It has been considered in practice that the rule is otherwise.

THE REFEREE.—It has not been so held by any decision because no similar motion has ever been made before me.

Mr. *Foster*. The jurisdiction is founded on Statute, and the greater includes the less in the language of the

Statute and by the order, the expression is general and includes both kinds of appeal. An appeal from the Master may involve a good deal besides a point of practice, and it is reasonable that leave should be asked for from a Judge. 1871. Russell v. Brackon.

Mr. *MaLennan*, in reply. What were being dealt with by the orders were decrees of the Court, appeals from which would be to the Court of Appeal, so that my construction of the order limiting its meaning to such appeals, is the obvious and natural one. What I ask for is, merely a temporary suspension of a rule of the Court limiting the time for appealing from the Master's report, and it seems to me that the jurisdiction in such a matter is peculiarly the province of the Referee as practice Judge.

THE REFEREE suggested that the present motion should be made before a Judge, that a definite ruling might be had on the point; and the matter was brought up before *Strong*, V. C., who held that such motion might be made before the Referee. Judgment.

KENNEDY V. ROYAL INSURANCE COMPANY.

Affidavits on production.

The affidavit on production is a substitute for discovery on interrogatories, and a party is entitled to such discovery up to the latest possible date.

Where an affidavit had been sworn before the service of an order to produce it was *held* to be irregular and insufficient, and a new and better affidavit ordered to be filed.

[September, 1871.]

Mr. *Huson Murray* moved for a further and better affidavit on production, on the ground that the affidavit filed had been sworn to before the order to produce was served, and that he was entitled to an affidavit up to the

1871. latest period he might by his order call for it. Other documents may have come to the defendant's possession since the serving of the affidavit.

Kennedy v. Royal Ins. Company.

Mr. *A. Hoskin*, contra.

Mr. Boyd, Master in Ordinary, sitting for the Referee.—The affidavit is the answer to the order to produce. What right has the defendant to make such an affidavit till he is required to do so by the order? The defendant's warrant to swear to the affidavit on production is in the order which requires him to produce, *under oath*. He cannot properly anticipate this order, and in my view an affidavit sworn before the issuing of such an order is irregular. Then, again, the object of the order is to be looked at. That object is two-fold—it in effect requires from the defendant discovery as to the documents in his possession relating to the suit, and it further requires him to make production of such of them as are not privileged. Production may be the main thing, but that production involves discovery. The form of the affidavit provided by the General Order clearly manifests this. In *Nicholl* v. *Elliott* (*a*), it is said by the Chancellor: "The order, of course, for the production of documents supplies the place of ordinary interrogatories formerly introduced into the bill, and the affidavit in reply comes instead of the answer to that interrogatory. Whatever discovery, therefore, a defendant would have been bound to give by answer with respect to documents in his possession ought now to be furnished by the affidavits in reply; and the ground upon which he relies to excuse production should be stated with the same particularity. When the affidavit fails to furnish the discovery to which the plaintiff might be entitled, it will be competent for him to cause the defendant to be examined *viva voce*, and when that necessity arises without a sufficient excuse the costs of

Judgment.

(*a*) 3 Grant, 545.

such a proceeding is to be borne by the defendant. When the ground assigned is insufficient, production is to be ordered."

1871.

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Now, if the order is to have its proper scope, it means that the plaintiff is to have discovery brought down to the latest date, as well as production made within the time mentioned in the order: the last clause of the affidavit indicates that the information is to be brought down to the date of swearing the affidavit. Suppose the present affidavit was sworn after the issue of the order, but yet in the last clause limited the information given by stating that the defendant, up to the 24th of April last past, had not any documents, &c., can it be argued that such an affidavit would have been passed over as sufficient. In effect that is what is done in the present case. I do not regard it as a compliance with the order. I direct a further affidavit in proper form to be filed within twenty-eight days.—See *Hanslip* v. *Kitton* (*a*). Costs by consent to be costs in the cause.

Judgment.

Devlin v. Devlin.

Dismissing bill—Mistake or slip by solicitor.

The Court has jurisdiction to relax its general as well as its special orders, and will in its discretion, do so to further the ends of justice, or to relieve a suitor against difficulties occasioned by a solicitor.

Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused.

[September 8, 1871.]

Mr. *Tilt*, for the defendant, moved to dismiss the plaintiff's bill for default in not complying with an undertaking given to go down to hearing at a sitting of the Court now passed.

(*a*) 1 DeG. J. & S. 440.

1871.

Devlin v. Devlin.

Mr. *Ince*, for the plaintiff. The omission to set down the cause was a slip on the part of the solicitor, which, when he discovered, he endeavored to repair by applying to the defendant's solicitor to take short notice, which was refused; and cited *Weir* v. *Weir* (*a*).

Mr. *Tilt*, in reply. The order to dismiss is a matter of course, under the circumstances. We are entitled to it as a matter of right. The plaintiff is bound by the act of his solicitor, and the Court will not relieve the client against the solicitor's neglect or mistake.

MR. BOYD, MASTER IN ORDINARY, sitting for the Referee.—The question to be settled upon this motion is, whether the plaintiff's bill should be dismissed or not. Having failed to comply with the undertaking, it is urged, the bill should go. Manifestly the plaintiff personally is not to blame; she desires to prosecute the suit promptly, but through a slip of her solicitor the undertaking has been broken. The evidence, however, shews no wanton or perverse delay, but rather that had the defendant waived his strict right as to length of notice, the plaintiff would have had the cause disposed of this present term. Now, for this accident on the part of her solicitor, is the plaintiff to suffer the penalty of having her bill dismissed? I am referred to cases (*b*), shewing that the Court will not relieve the client against the solicitor's neglect. The rigid rule laid down in these cases has been departed from in later practice, and it has been held that the Court has power to relax its general, as well as its special orders, to relieve from undertakings, and to extricate clients from difficulties occasioned by their solicitors. See *Powell* v. *Corfield* (*c*), *Bartlett* v. *Harton* (*d*). In *Kennedy* v. *Wakefield* (*e*), *Stuart*, V. C., adopts the language of Lord *Eldon*, and says, "there

Judgment

(*a*) 1 Ch. R. 194. (*b*) 14 Sim. 198, and 1 R. & M. 334.
(*c*) 7 Jur. 1124. (*d*) 17 Beav. 479. (*e*) 5 De. G. & Sm. 248.

is no general rule with respect to the practice of this Court, that will not yield to the demands of justice." The case of *Weir* v. *Weir* (*a*), shews the extraordinary indulgence that the Court manifests to the wife in alimony cases. There the Chancellor extended the solicitor's undertaking to speed the cause, and apparently unconditionally. In the present case such an application should be in the form of a cross-motion.—See *LaMert* v. *Stanhope* (*b*), yet that is only matter of form. It may be dispensed with, as was done in *Mulholland* v. *Downs* (*c*). 1871. Devlin v. Devlin.

The Chancellor's reason for not dismissing the bill in *Weir* v. *Weir* was, that forthwith a new bill might be filed, and successful application made for interim alimony therein. That applies here. No doubt this Court has jurisdiction, as in the English Divorce Court, to deprive the wife altogether of alimony, *pendente lite*, or to lessen it to the smallest amount, where she is guilty of vexatious litigation.—See *Hakewill* v. *Hakewill* (*d*). Here, if the bill was dismissed, and a new one filed, it could not be properly said, under the circumstances, that the second suit was vexatious, and I see no reason why she should not get her alimony, pending that suit. Judgment

If it appeared in the present case satisfactorily that the suit was not *bonâ fide* instituted, but merely for the purpose of extorting money from the husband, and that the delay was not the consequence of an accident (which the plaintiff was willing to repair, if the defendant had permitted,) but deliberately designed, then there would be great propriety in suspending the alimony till the hearing of the cause, as was done in *Rogers* v. *Rogers* (*e*). But here the facts would not warrant such an

(*a*) 1 Ch. Cham. R. 194. (*b*) 5 DeG. & Sm. 248.
(*c*) 2 Ch. Cham. R. 238. (*d*) 30 L. J. Mat. 254.
(*e*) 34 L. J. Mat. 87.

1871. Devlin. v. Devlin.

order. The wife, however, seeks an indulgence, and the costs of the application should be paid, *Lewis* v. *Lewis* (*a*). I suppose her solicitors will not object that the order should go for them to pay the costs personally. I think also, that any arrears of alimony should run from the date of the present order.

HOWE v. HOWE.

Interim alimony, from what time properly payable.

Interim alimony runs from the time of the service of the bill, if there has been no want of diligence on the plaintiff's part in making the application.

[CHAMBERS, September, 1871.]

This was an application for the payment of interim alimony, and the question arose upon the frame of the order as to the period from which the same was properly chargeable.

Judgment.

MR. BOYD, MASTER IN ORDINARY, sitting for the Referee, made the following note of the practice :—

In England the old practice was to award interim alimony from the *return* of the citation, unless under special circumstances, when it might be ordered to run from the *issue* of the process. *Bain* v. *Bain* (*b*), *Loveden* v. *Loveden* (*c*). The Court acts upon this: whether or not the wife is able to obtain subsistence on the credit of the husband? If there has been diligence on the part of the wife in the conduct of the suit, that is a reason for giving alimony from the earliest period possible in the suit. *Harris* v. *Harris* (*d*), where it was ordered that alimony should commence from the return of the citation, and that the amount of all debts which the wife had incurred since that time should be deducted. In *Soules*

(*a*) 29 L. J. Mat. 128.
(*b*) 2 Add. 258, 1 829.
(*c*) 1 Phill. 208, 1810.
(*d*) 1 Hagg. Ecc. R. 352.

v. *Soules* (*a*) the Vice Chancellor seems to think that interim alimony should not be ordered to commence prior to date of decree by which it is allowed, citing *Rees* v. *Rees* (*b*), but this was where there had been great delay in the application by the wife. From the return of the citation it is held there is a *lis pendens*. *Sherwood* v. *Kay*. So in our practice it is clear that there is *lis pendens* when the bill is served, if not when bill is filed. Let alimony run from date of service of bill. See *Nicholson* v. *Nicholson* (*c*). 1871. Howe v. Howe.

HARVEY v. DAVIDSON.

Dismissing bill.

After the twelve weeks allowed for the service of a bill of complaint, if the same has not been served, the defendant is entitled to an order to dismiss, unless the plaintiff shews such excuse for the delay in effecting service as would justify an order allowing service notwithstanding the lapse of time.

[October 2, 1871.]

Mr. *Paterson* moved to dismiss. The bill had been filed upwards of twelve weeks and a *lis pendens* registered against the defendant's lands.

Mr. *Arnoldi*, contra.

MR. TAYLOR, REFEREE IN CHAMBERS.—When a defendant moves, after the twelve weeks, to discharge a bill on the ground that it has not been served upon him, but a *lis pendens* has been registered against his lands, the application should be granted, unless the plaintiff can shew such an excuse for the delay in effecting service as would justify an order allowing the service, if the bill were now served. To hold otherwise and refuse the Judgment.

(*a*) 8 Grant 116. (*b*) 8 Phill. 392.
(*c*) 31 L. J. Mat. Ca. 165.

1871.

Harvey v. Davidson.

application would have this effect, the plaintiff could not proceed any further with this suit, because even if he served the bill now, he could not get the service allowed under General Order 96, and the defendant would be left with a certificate of *lis pendens* registered against his lands, and no means of getting it removed.

I think it is not assuming too much against the plaintiff to assume that on this motion to dismiss his bill, he has offered the best excuse for his delay which he can offer. The excuse offered seems wholly insufficient. The difficulty in finding some papers necessary for the further prosecution of the suit, might be a ground for asking to postpone a hearing, but is no excuse for not serving the bill. Besides this is the second bill filed by this plaintiff against the defendants for the same matter. The first bill I dismissed for want of prosecution in June last, a few days before the filing of the present one. It is said there is no evidence of the former suit before me on the present motion, but I cannot shut my eyes to the fact that I myself discharged the former bill. At all events I can, at any time, inform myself of a fact which appears by the records of the Court. *Ostrander* v. *Ostrander* (*a*). I therefore dismiss the bill with costs.

Judgment.

This case was appealed, and the appeal heard before STRONG, V. C., who affirmed the Referee's decision.

(*a*) 3 Cham. R. 50.

1871.

KERR v. FINLAYSON.

Amending after replication.

Although the Court may, at any time, under proper circumstances, permit an amendment of the bill in furtherance of justice, and upon such terms as it may think fit to impose, nevertheless, to obtain such indulgence, the plaintiff must satisfy the court by affidavit of the cause of the delay, and that due diligence has been used in the prosecution of the suit.

[October 20, 1871.]

MR. TAYLOR, REFEREE IN CHAMBERS.—The English Orders relating to the amendment of bills, seem to place a narrower limit on the power of the Court to permit amendments than our Orders do. The English Consolidated Order 9, sec. 14, says, that a special order to amend shall not be permitted without an affidavit, that the draft of the proposed amendment has been settled, approved, and signed by counsel; and that the amendment is not intended for the purpose of delay or vexation, but because it is considered material to the case of the plaintiff. The 15th rule, which provides for applications after the plaintiff has filed, or undertaken to file replication, or after the expiration of four weeks from the time when the last answer was held sufficient, requires a further affidavit, shewing that the matter of the proposed amendment is material and could not with reasonable diligence have been sooner introduced into the bill. Rule 16 requires these affidavits to be made by the plaintiff and his solicitor, or by the solicitor alone, in case the plaintiff from being abroad, or otherwise, can not join.

Judgment

Consolidated Order 344 of our own Court, provides that where a suit is defective from some imperfection in the bill, and not in consequence of an event arising subsequent to its institution, the Court may, at any time, permit an amendment of the bill in furtherance of justice, and on such terms as it thinks proper; the order

1871. to be applied for by motion upon notice. And Order 346 says, the Court must be satisfied by affidavit, or otherwise, of the truth of the proposed amendment, and of the propriety of permitting it to be made at the particular stage of the cause under all the circumstances. It has always been usual, and properly so, to require, where the application is made after the expiration of the four weeks, an affidavit accounting for the delay, and shewing due dilligence in the prosecution of the suit. Here there is no such affidavit, all that the solicitor swears to is, that he was not aware of the facts which render the amendment necessary until the examination of the defendant. Now the replication was filed on the 9th of September, so the answers of the defendants must have been in for some time before, but the defendant was not examined until the 20th of October, four days after the last day for setting down the cause for hearing at the place where the venue was laid. No reason is given why he was not examined sooner.

Kerr v. Finlayson.

Judgment.

The amendments proposed are material. The bill was filed originally by the plaintiffs as judgment creditors of the defendant *H. M. Finlayson*, seeking to set aside as fraudulent, the conveyances by which certain lands, alleged to be his property, had been conveyed to his wife. The object of the amendment is to allege the sale by the wife of some of the lands, the taking by her of mortgages for the purchase money, to add as a party one *Jackson*, to whom the mortgages have been assigned, as security for future advances, and to pray that the plaintiffs may be paid their debt out of the moneys payable under these mortgages, after satisfying the advances made by *Jackson*.

As the evidence now stands, the application cannot succeed, but I think I should give the plaintiffs an opportunity of shewing if they can, that these amendments could not with reasonable diligence have been introduced

into the bill sooner. In *Champneys* v. *Buchan* (*a*), a plaintiff was allowed to amend after the replication had been filed a whole year, and he had during all that time under his own control the means of obtaining the information necessary for the purpose of amending. The affidavit should detail the circumstances upon which the plaintiffs rely, as accounting for their delay.—*Attorney General* v. *Corporation of London* (*b*). 1871. Kerr v. Finlayson.

The motion may stand over for this purpose for four days; and a copy of the affidavit proposed to be used, should be given to the defendant's solicitor in two days.

If the plaintiffs decline to furnish such an affidavit, or cannot furnish a satisfactory one, the motion must be refused with costs. Judgment.

Re Baker—Bray's Claim.

Insolvent Act—Double proof.

The doctrine against double proof applies only when both estates are being administered in insolvency.

A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately endorsed the note.

[December 8, 1871.]

Bray, the claimant, held notes made by *Dawbarn & Co.*, and endorsed by *Baker*, a member of that firm. *Baker* died, and his estate was being administered in Chancery by his widow, his executrix. *Dawbarn & Co.* went into insolvency, and *Bray* proved his claim upon the notes in the proceedings in insolvency. He then came in as a creditor to the firm in the administration

(*a*) 3 Drew 5. (*b*) 13 Beav. 318.

1871. suit, and it was objected that he had elected to proceed against the joint estate of the parties.

Re Baker.

S. G. Wood, for *Bray*.

Snelling and *Keefer*, contra.

Mr. BOYD, MASTER IN ORDINARY.—Both parties cited and relied upon the decision of the Court of Queen's Bench in *Re Chaffey* (*a*); but it was not very much help to a solution of the question discussed on this claim. That decision was upon the effect of certain clauses of the Insolvent Act of 1864. The facts were, that a partnership firm made a promissory note, which was endorsed by one of the partners to a creditor. The firm and the partner both became insolvent, and their joint and several estates were being administered in the Insolvent Court. It was held that the endorse-

Judgment. ment of the partner was a security for the payment of the creditor's claim, but not a security from the insolvent firm or from the estate of that firm within the meaning of sec. 5, sub-sec. 5, of that Act; consequently that that Act did not require the creditor proving on the partnership estate to put a value on this endorsement. In truth the case was not within the Act at all, but was governed by the general law as to securities held by a creditor, viz., that he can prove against the bankrupt estate, retaining his security. Then the decision goes one step further—that if the partner's estate is in insolvency, the creditor retaining his security cannot rank upon the partner's separate estate as well as upon the joint estate of the partnership.

The case before me was argued as if the question arose entirely under the Insolvent Act of 1869. Assuming this for the moment, then section 60 of that Act

(*a*) 30 U. C. Q. B. 64.

supplies words sufficient to include the indorsement of an insolvent partner, *i.e.*, one who has been made an insolvent under the Act, not merely a person unable to pay his debts in full—one of an insolvent firm, under the foregoing state of facts, within the securities which are to be valued and dealt with by the Insolvent Court. In this view the question should have been raised before the Insolvent Court when *Bray* proved his claim there. But here the partner who indorsed is dead, and his estate is being administered, not in insolvency, but by the Court of Chancery, and the special provisions of the Insolvent Act do not apply to the case. The rights of the creditors proving claims in this office are to be measured by the extent of their rights if they had been suing at law the executrix of the partner on his indorsement, after proving upon the partnership estate in insolvency, such proceedings in insolvency being instituted after the partner's death. Now, supposing *Bray* had been suing the executrix on her husband's endorsement, I know of no defence at law which she could set up: see per *Mansfield*, C. J., in *Heath* v. *Hall* (*a*). 1871. Re Baker. Judgment.

The rule laid down by Lord *Lyndhurst*, in *In re Plumner* (*b*), applies here: "If the creditor of a bankrupt *holds a security on part of the bankrupt's estate*, he is not entitled to prove his debt under the commission without giving up or realizing his security. But if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound." Now, here the insolvent firm of *Dawbarn & Co.* are the makers, and *Baker*, the deceased partner of that firm, is the indorser; the claim of *Bray* is against the executrix of the indorser, clearly a third party as regards

(*a*) 8 Taunt. 328. (*b*) 1 Phil. 59.

1871. Re Baker. the partnership estate in insolvency. This is the opinion of the Court in *Re Chaffey* (*a*), though not necessary in that case for the decision of the appeal. See also *In re Sharpe* (*b*), and *Beasley* v. *Beasley* (*c*).

My conclusion is, that the creditor is entitled to prove for his full claim, and that my duty is to report the circumstances specially to the Court, that they, on further directions, may impose any conditions that they think advisable upon this creditor, in view of his proving on the *Dawbarn* estate in insolvency.

As to the mere right to prove without being obliged to elect, I may remark that even in Bankruptcy it is held that a joint and separate creditor ought to prove against both estates, but elect which he will be paid out of before he takes a dividend: *Ex parte Bentley* (*d*).

Judgment. The case of *Ex parte Thornton* (*e*), a note of which Mr. *Snelling* very properly handed me, though it makes against his contention, is quite in point, and confirms the view I have taken, as it establishes the principle that the doctrine against double proof applies only when both estates are being administered in Bankruptcy. I also refer to *Ex parte Baureman* (*f*), *Ex parte Stanborough* (*g*).

(*a*) Page 70.
(*b*) 20 U. C. C. P. 82.
(*c*) 1 Atk. 97.
(*d*) 2 Cox. 218.
(*e*) 8 DeG. & J. 454.
(*f*) Mont. & Ch. 578.
(*g*) 5 Madd. 89.

INDEX

TO THE

PRINCIPAL MATTERS.

ABSTRACT OF TITLE.

See "Orders," 2.

ACT 29 VIC., CH. 28, SEC. 33.

See "Property and Trusts Act."

ADMINISTRATION AND ADMINISTRATION SUITS.

1. Where an order for administration had been granted to a devisee who was also a creditor of the estate to a large amount, but did not state that fact when applying for administration, his silence as to it was considered a ground for sustaining an order transferring the conduct of the proceedings under the reference to another party interested under the will.

2. No one has a special right to the conduct of proceedings in the Master's office upon a reference under an administration order, but *ceteris paribus* it will be committed to those who have the greatest interest in conducting them properly and economically.

Perrin v. Perrin, 452.

3. In a suit by a creditor for the administration of his deceased debtor's estate, any party beneficially interested in the estate may apply to stay proceedings on payment of the creditor's claim and costs, The right to do so is not confined to the personal representative.

Fitten v. Dawson, 461.

4. The control of the Court ceases with the death of the lunatic, and an order for the distribution of a lunatic's estate will not be made under proceedings in lunacy.

Under such circumstances the committee of a lunatic took under authority of the Court proceedings for the administration

of the estate of a deceased lunatic, by applying for an administration order, which was granted; the proceedings being directed to be as inexpensive as possible.

Re Brillinger, 290.

5. *Held*, that a suit against an administrator by a person entitled to a legacy or distributive share of the estate cannot be brought before the expiry of a year after the death of the intestate.

Slater v. Slater, 1.

6. Under an administration decree, a creditor claimed by virtue of a partnership with the testator. It was objected that the establishment of his claims involved taking the partnership accounts, and they could not be gone into under the decree. The Master *held* that the claim could be entertained, and directed that a third party to the partnership who was a stranger to the suit should be served with an office-copy decree, and notified of the proceedings to take the partnership accounts.

Kline v. Kline, 137.

7. Where, on an application for an administration order, the fact of the defendant being administrator is not disputed, and the plaintiff has filed an affidavit that he is administrator, it is not necessary to give further evidence of the fact, or to produce the letters of administration, or a copy thereof.

Re Bell.—Bell v. Bell, 397.

8. Where an administrator by his accounts admitted in his hands $112, the Court refused a motion for payment of that amount into Court pending the reference.

Collins v. Orme, 70.

ADMINISTRATION DECREE.

See "Administration," 6.

ADMINISTRATION ORDER.

See "Administration," 7

AFFIDAVITS.

1. An affidavit, in answer to affidavits filed in reply, filed after an enlargement of the motion, was held regularly filed, and allowed to be read, the Court offering to give the other party time to reply to it, if he required to do so.

Dewar v. Sparling, 224.

2. On an application for leave to appeal from the Court of Chancery to the Court of Error and Appeal, the proceedings were *held* to be rightly styled as in the Court of Chancery, although security for appealing had been perfected.

Taylor v. Webb, 33.

3. An affidavit sworn before a commissioner for taking affidavits in the English Court of Chancery, at Glasgow, was held to be insufficiently sworn.

McEwan v. Boulton, 63.

4. The affidavit on production is a substitute for discovery on interrogatories, and a party is entitled to such discovery up to the latest possible date.

Where an affidavit had been sworn before the service of an order to produce, it was *held* to be irregular and insufficient, and a new and better affidavit ordered to be filed.

Kennedy v. Royal Insurance Co., 489.

ALIMONY.

1. On an application for interim alimony, the validity of the alleged marriage cannot be tried. If a marriage *de facto* is proved, it is sufficient.

But to obtain an order for interim alimony, the plaintiff must shew she is in want of means of support.

When the parties had been living separate for four years, and the wife did not allege she was in want of means of support, and the husband swore she was in better circumstances than he was, an order was refused.

Bradley v. Bradley, 329.

2. Where in an alimony case, no one appearing for the defendant, an order had been made for interim alimony for the amount endorsed on the bill, which the defendant considered excessive; on a motion by him to set the order aside, a reference was directed on payment of the costs (*dives costs*) of the application.

Hooper v. Hooper, 114.

3. Interim alimony runs from the time of the service of the bill, if there has been no want of diligence on the plaintiff's part in making the application.

Howe v. Howe, 494.

AMENDING.

[AMENDING DECREE.]

1. A motion to amend a decree in which the pleadings and evidence or anything beyond the judgment and decree have to be looked at, must be presented in Court, and not in Chambers.

Under Order 562, the Referee will order such matters only as can regularly be brought on before him in Chambers to be heard before a Judge, it he thinks it proper. Where on a petition to amend a decree the petitioner asked in the alternative for a rehearing and that the Referee would adjourn that part of the application to be heard before a Judge, the Referee *held* it to be beyond his jurisdiction, and dismissed the petition with costs.

Lapp v. Lapp, 234.

A consent decree may be amended on petition, if it is shewn that it contains terms which were not consented to.

Merchants' Bank v. Grant, 64.

[AMENDING BILL.]

2. An order to amend taken out pending a demurrer, without providing for the costs of the demurrer, was *held* to be irregular.

Lowe v. Campbell, 97.

3. Where an order giving leave to amend, has been granted without limiting the time in which the amendments are to be made, such amendments should be made within fourteen days from the date of the granting of the order; where circumstances prevented this being done, and no order dismissing the bill in the alternative of it not being done, was embodied in the other granting the leave to amend, the Referee *held* it to be competent to the Court to grant further time for amending, even on an application made after the fourteen days have expired, if a proper case was made out for it.

McMurray v. Grand Trunk Railway Co., 306.

4. Amending a bill does not necessarily give a defendant who has answered the original bill, fresh time to answer.

Where amendments had been made by adding parties, and not affecting the original defendant who had answered an application by such defendant, to take the replication off the files and strike the cause out of the hearing list, because he had not had time to answer, was refused.

Carter v. Adams, 57.

5. Although the Court may, at any time, under proper circumstances, permit an amendment of the bill in furtherance of justice, and upon such terms as it may think fit to impose, nevertheless to obtain such indulgence, the plaintiff must satisfy the Court by affidavit of the cause of the delay, and that due diligence has been used in the prosecution of the suit.

Kerr v. Finlayson, 497.

ANSWERING.

[NEGLECTING TO GIVE NOTICE OF.]

1. Where a defendant's solicitor files an answer but neglects to give notice thereof, the Court will not order it to be taken off the files, but will extend to the plaintiff the time for taking the next step in the cause, by such time as has been lost by the neglect in giving notice.

Parker v. Brown, 354.

[FILING WITHOUT CORPORATE SEAL.]

2. There is no authority for allowing a corporation to file an answer without seal, except by consent.

Where a stay of proceedings was asked to enable the defendants to apply at law for a mandamus to compel the head of the corporation to affix the corporate seal to the answer, but it was not shewn that the majority of the shareholders approved of the answer; the application was refused with costs.

Gildersleeve v. Wolfe Island Railway and Canal Company, 358.

[LEAVE TO ANSWER AFTER TIME EXPIRED.]

3. The Court is loath to debar a defendant from answering, when he shews he has a good defence on the merits, and that to refuse would or might amount to a denial of justice. Leave was granted to a defendant to answer under such circumstances even after considerable delay on his part, he being put on terms as to costs, going to hearing, and otherwise.

Ritchie v. Gilbert, 377.

APPEALING.

[FROM THE REFEREE.]

1. On an appeal from the Referee the case will be confined strictly to that made on the original motion, and only such pleadings or other documents as were then read will be allowed to be used.

The Court will inform itself of what these were, and take notice of its own records and proceedings when it becomes necessary.

When a question arose as to what pleadings had been read on a motion, the Court sent for the Referee's notes, and was guided by them.

Perrin v. Perrin, 452.

2. The fourteen days in which a party must bring on an appeal from an order made in Chambers, count from the entering of the order, not from its date.

Harvey v. Boomer, 11.

[ON A QUESTION OF DISCRETION.]

3. There is no appeal from a decision on a question which is by the practice purely within the discretion of the Judge.

Chard v. Meyers, 120.

[FROM THE MASTER.]

4. An appeal from a Master was allowed after an interval of six months (the long vacation intervening) when it was considered that the interests of justice warranted it.

Ib., 120.

5. *Held*, overruling *McQueen* v. *McQueen*, *ante* Vol. II., page 471, that on an application for leave to appeal from the Master's report, besides accounting for the delay, it is necessary that the party appealing should make out a *primâ facie* case for appeal.

Dickson v. Avery, 222.

6. An order of Court dismissing an appeal from the Master, was held to be an interlocutory order, and it was held that an appeal against the same should have been brought within six months.

Brigham v. Smith, 313.

7. The present practice of the Court, as established by decisions, limits the time for appealing to a year from the date of the original decree, where a cause has been re-heard and afterwards carried to the Court of Appeal; but the fact of an application to extend the time for appealing being made before the expiry of a year from the decree on rehearing, was looked on as furnishing cogent reason for a liberal exercise of the discretion vested in the Court to extend the time, and the time extended accordingly.

Tyler v. Webb, 33.

See "Leave to Appeal."

ASSIGNMENT.

See "Title."

CERTIFICATE.

See "Quieting Titles."

CHANGING VENUE.

1. In a bill relating to property in Toronto, there not being sufficient time to get the cause down for hearing at the next ensuing Toronto Sittings, the venue was laid at Whitby with a view to bringing the case to a hearing at the ensuing sittings there; after answers the defendants moved to change the venue to Toronto, and filed affidavits stating that some of their witnesses were out of the jurisdiction, and the evidence of such witnesses could not be procured in time: that others were resident in Toronto engaged on defendants' railway there, and their attendance at Whitby would interfere with the working of the railway at Toronto. The court granted the motion on the defendants' undertaking to abide by such order as the Court might make as to any damages which the delay caused by change of venue would occasion.

McMurray v. Grand Trunk Railway Co., 133.

2. Under an order to amend obtained on *præcipe*, a change in the venue laid in the bill cannot be made.

A cause set down for hearing at the county town named in the amendments, was ordered to be struck out of the list.

Frietsch v. Winkler, 109.

3. The court will not change the venue merely to enable a plaintiff to speed his cause, the more especially if the plaintiff has himself been guilty of delay in proceeding.

James v. James, 58.

4. A party making affidavit for the purpose of moving to change the venue, and stating that certain parties are material and necessary witnesses, is not bound on cross-examination to state what evidence he expects from such witnesses, or to state facts tending to test the materiality of the proposed evidence.

Crombie v. Bell, 195.

CHILD, CUSTODY OF.

The Court has an absolute right in its discretion to give the custody of a child under twelve years of age to the mother.

The Court exercised this right where the only evidence that the parents were living apart through the fault of the husband, was the evidence of the wife; holding, that the Court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is, on her own statement, justifiable; and the Judge is not prepared to say that he disbelieves such statement.

Re Davis, 277.

COMPENSATION.

See "Sale," 5.

CONTEMPT.

When a party has been committed for not bringing in accounts, and it is shewn by certificate that the accounts have since been brought in, it cannot be urged on a motion for his discharge that the accounts are insufficient.

Nor will the payment of costs be made a condition precedent to his discharge.

Clark v. Clark, 67.

COSTS.

1. Although the Court will interfere and order a retaxation of costs, even after a judgment has been obtained for them, when the overcharges are gross and excessive; yet a client must come promptly, more especially when the relationship of solicitor and client has ceased to exist, to obtain such relief; and it will not be granted if the amount overpaid is small.

Re Scott—Scott v. Burnham, 467.

2. Where the alleged excess overpaid was only $15, making about one-twelfth of the whole bill, and the application was not made until after great delay; the Referee refused an order for retaxation, and the decision was upheld on appeal.

***Ib.*, 467.**

3. The rule of this Court, that when the subject matter of a suit is settled by defendant before decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless the defendant consents, applies to mortgage suits.

4. A defendant in such a case may insist on the suit going to hearing, as there may be grounds on which he may be

relieved from costs. Where under such circumstances the Referee refused an application by plaintiff for the payment by defendant of the costs of the suit, an appeal from such order was dismissed with costs.

McLean v. Cross, 432.

5. Where a bill had been filed on a mortgage on which only a small sum for interest had become due two days previously, and the defendant's solicitor had called at the plaintiff's solicitor's office and left word that he was ready to pay the money; the Court refused the plaintiff his costs, and *held* the bill was unnecessarily and improperly filed.

Ib. 432.

6. Certain funds had come to the hands of an official assignee, but were payable to encumbrancers under claims arising before the insolvency; the judge in insolvency had ordered certain costs of the insolvent to be paid thereout. On appeal such order was reversed, the Court holding that the 11th section of the Insolvent Act of 1864 applies only to assets which belong to the insolvent beneficially.

Re Stewart, 95.

7. Where on an application by a solicitor for a taxation of his bill of costs the client disputed the retainer as to the whole bill and also set up the Statute of Frauds, it was held that the Court had jurisdiction to refer these defences to the Master.

8. An order of course for the taxation of costs is not to be discharged for the omission therefrom of any reference to defences of which the petitioners had no previous intimation.

Re Bacon, 79.

9. When a party unnecessarily served with a notice of motion appears thereon, he will be allowed his costs.

Robertson v. Grant, 331.

NOTE.—This was decided on the authority of Clark v. Simpson, L. R. 6 Eq. 336, which has since been overruled.

10. A plaintiff amending his bill after service of a demurrer, and before the same has been set down for argument, although after a longer period than eight days has elapsed, is liable for 20*s.* costs only, and not for taxed costs.

Weiss v. Rankin, 190.

11. When on a plaintiff's motion for appointing a guardian to an infant defendant, the person appointed is nominated by

or at the instance of the infant; he is not entitled as of course to his costs against the plaintiff.

Clements v. Arnold, 75.

12. A party appearing to ask costs on a notice irregularly served, does not thereby waive the irregularity.

Fisken v. Smith, 74.

13. In a case where infants were interested, and it was necessary to have the conveyance settled by the Master, and one of the parties to the conveyance being out of the jurisdiction it also became necessary to obtain a vesting order; the Referee allowed the purchaser the extra costs so incurred.

But a question being raised as to the executors, and it being shewn that they disclaimed all interest when applied to, no costs occasioned by such question were allowed.

Re McMorris, 430.

14. A plaintiff suing *in forma pauperis* is not liable to have his suit stayed until he has paid the costs at law, or of a former suit in this Court, touching the same subject matter, unless it can be shewn that the proceedings are vexatious.

Where therefore a plaintiff had been ordered to give security for prior costs at law, and by another order the time for giving security had been limited, and in default the bill ordered to be dismissed, and the plaintiff was afterwards admitted to sue *in forma pauperis*, the two orders for giving security were set aside.

Where costs are given to a plaintiff suing *in forma pauperis*, they are in general, and unless otherwise ordered, *dives* costs.

Casey v. McColl, 24.

15. The first part of General Order 315 applies to cases where several persons are acting in the same interest, and where costs are to be apportioned among them. It does not empower the Master to deprive any one of his entire costs where the decree gives costs generally. A surviving trustee, and the representatives of a deceased trustee, are not within the rule which prevents trustees severing in their defence at the risk of having but one set of costs between them.

Reid v. Stephens, 372.

16. Where the object of a suit has been attained, the proper course is, for the plaintiff, if he seeks costs, to apply to the defendant to have the question of costs disposed of on motion; unless he does so, he will not be given the extra costs occasioned by going on to a hearing.

Query: Will such a motion be entertained at all, except by consent.

Semble, if the defendant refuses consent to the costs being disposed of on motion, the plaintiff will get his extra costs of going to hearing.

Webb v. McArthur, 364.

17. Where after notice of motion to stay proceedings until the costs of a former suit for the same cause of action should be paid, such costs are paid, the costs of the motion to stay proceedings will be made costs in the cause.

Little v. Hawkins, 78.

18. A counsel fee on hearing, isn ot taxable until the cause has been set down for hearing, and notice of hearing given.

Dewar v. Orr, 141.

19. If a cause irregularly set down for hearing by the plaintiff is struck out upon defendant's motion in Chambers with costs, this entitles the defendant to tax costs of the application only and not the costs of preparing for hearing.

Frietsch v. Winkler, 141.

20. An order will not be granted for a taxation of costs before a Master in an outer county even on a consent,

Re Solicitors, 90.

21. Costs incurred on setting down a cause, and afterwards countermanding notice of setting down, were granted on an *ex parte* application.

Armour v. Noble, 99.

22. Where in a suit by creditors to set aside a settlement, lands were ordered to be sold, and the proceeds paid into Court; a purchaser after confirmation of sale paid his money into Court, and had his conveyance prepared and tendered for execution, to the trustees, who were absent from the jurisdiction, and who refused to execute it; a vesting order was granted, and the costs of the motion were ordered to be paid out of the fund in Court.

Lawrason v. Buckley, 270.

23. An application for costs of not proceeding to hearing according to notice, will not be granted *ex parte*. The practice discussed *Armour* v. *Noble*, 3 Cham. R. 99, considered.

Jardine v. Hope, 197.

24. Where a solicitor has funds of a client in his possession, or has papers over which he claims a lien, he is subject to the summary jurisdiction of this Court, which will order delivery and taxation of his bills, and the payment over of any balance, notwithstanding that the services for which he claims have been wholly in County Court procedings.

Re Prince, 282.

See "Security for Costs"—"Infants"—"Next Friend"—Master's Office, 4—Solicitor."

COUNSEL FEE.

See "Costs," 18.

COUNTY COURT.

See "Costs," 24.

CREDITORS.

See "Notice."

DECREE.

1, Where in a mortgage suit a defendant by answer admitted the making of the mortgage, but denied an alleged agreement to pay an increased rate of interest, and set up a tender of the amount he contended was properly due on the mortgage, and claimed his costs it was held not to be a case where the plaintiff was entitled to a *præcipe* decree.

The plaintiff's solicitor asked that if the Referee considered the decree erroneous, it might be amended by inserting a direction for the Master to enquire as to the alleged tender. *Held*, that such an amendment could not be made, the decree being one which could not be issued on *præcipe*, and that a decree so issued, could contain no special direction or provisions.

Ross v. Vader, 236.

2. A motion to set aside a decree obtained by default, and not on the merits, was held to be properly made in Chambers.

Kline v. Kline, 79.

See "Amending," 1.
"Sale," 4.

DELAY.

See "Sale," 5.
"Registration," 1.

DELIVERY OF POSSESSION.

An application for an order for possession can not be made the means of trying the right to possession between a landlord and his tenant or a trespasser. Where, therefore, a mortgagor's tenant had attorned to the mortgagee, and afterwards such tenant left the premises, and they fell into the hands of another party, an order for possession against such party was refused.

Scott v. Black, 323.

DEMURRING.

See "Costs," 10.
"Parties," 3.

DISCOVERY.

See "Changing Venue," 4.

DISMISSING BILL.

1. The pendency of another suit in which the plaintiff could obtain the relief he seeks in a bill was considered no answer to a motion to dismiss.

Guthrie v. Macdonald, 99.

2. A bill was filed by churchwardens, and during the progress of the suit the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought to a hearing within the time required by the practice: it was *held* that a notice to dismiss the bill served on the plaintiffs' solicitor, was regular,

Query, whether it was necessary to make the new churchwardens parties.

3. On a motion to dismiss it appeared that the case had not been brought to a hearing, through an error in judgment of the plaintiffs' solicitor; *held* that it was proper to take into account such error in considering the application in connection with the other circumstances of the case.

McFeeters v. Dixon, 84.

4. After the twelve weeks allowed for the service of a bill of complaint, if the same has not been served the defendant is entitled to an order to dismiss unless the plaintiff shews such excuse for the delay in effecting service as would justify an order allowing service notwithstanding the lapse of time.

Harvey v. Davidson, 495.

5. The Court has jurisdiction to relax its general as well as its special orders and will in its discretion do so to further the ends of justice so as to relieve a suitor against difficulties occasioned by a solicitor.

Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused.

Devlin v. Devlin, 491.

ENDORSING PAPERS.

See "Security for Costs." 5.

EQUITABLE ASSIGNMENT.

Where a party gave a draft on a corporation indebted to him, but the proper stamps were not on the draft when the same was discounted, and the holder neglected to put on double stamps as required by the statute, it was held not to constitute an equitable assignment of the fund of the drawer in the hands of such corporation. But the drawer having written to the corporation directing them to pay the amount of such draft from the funds coming to him, such letter was *held* to constitute a good equitable assignment.

Robertson v. Grant, 331.

EQUITY OF REDEMPTION.

See "Sale," 1.

ESTATES TAIL.

A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting Assurance of Estates Tail; the purchaser accepted the conveyance, and paid the purchase money without seeing the will, or having the title investigated; the eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected,

urged the purchaser to buy, and was privy to the completion of the purchase, without giving any notice, of his title, or of the defect in the father's right to convey; the purchaser went into possession, and improved the premises, and had no notice of the defect in his title until after the death of the vendor: *Held*, that he was entitled to hold the property in equity against the issue in tail.

Re Shaver, 379.

In such a case, constructive notice of the defect in the vendor's title is no bar to the purchaser's right to relief.

Re Shaver, 379.

EVIDENCE.

[OF LOST DEED.]

See "Quieting Titles," 3, 4.

EXAMINING PARTIES.

1. The Court will take into consideration the fact that parties can be more efficiently examined in Toronto than in some outer counties, and will not consider alone the balance of convenience of the parties or solicitors attending.

An application to change the examination from Stratford to Toronto was granted, although no great difference was shewn as to the convenience of the parties interested, on the suggestion (without affidavits) that the examination could be more efficiently and expeditiously conducted in Toronto.*

Kahn v. Redford, 55.

2. Plaintiff filed a bill for specific performance of a contract, alleged to be made with defendant at an auction sale of lands at which plaintiff was a bidder, the defendant set up that plaintiff bought as his agent, that plaintiff was a *puffer*, and the sale illegal. Plaintiff moved to strike out the allegations as to the sale being illegal on the grounds stated as scandal and impertinence, and defendant moved that plaintiff submit to examination, he having refused to answer questions relating to the alleged fraudulent features of the transaction.

Held, that the matter being material was not scandalous, and that plaintiff must answer all proper questions.

Jones v. Huntingdon, 117.

* This case is misreported; the application was, under the circumstances, refused; but the fact that parties can be more efficiently examined at Toronto than in some outer counties, will, it is understood, have weight with the Court on an application to change the place of examination.—REP.

EXAMINING DE BENE ESSE.

On applying for an order to examine a witness *de bene esse*, it should be clearly shewn that the witness is the only witness as to the fact sought to be proved by him. An application, supported by an affidavit of the solicitor as to his belief, was refused.

Jameson v. Jones, 98.

EXECUTORS.

1. Where an executor is appointed for a limited period or until the happening of some event, his power as such executor ceases with the occurrence of such contemplated event.

A testator by his will appointed his wife executrix, and gave her certain legacies, provided she remained single, and in the event of her marrying again, made other disposition of his estate, and appointed another person his executor. An assignment of a mortgage made by her and her husband after her second marriage was held to pass no interest.

Conron v. Clarkson, 368.

2. Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established; and though his claim would otherwise be barred by the Statute of Limitations.

3. The right of retainer out of legal assets applies to *equitable* as well as to *legal* debts, especially in a case where there is no competition of creditors.

Kline v. Kline, 161.

FORECLOSURE.

See "Parties."
"Sale," 2.

FOREIGN COMMISSION.

The Master cannot *ex parte* issue a certificate for a foreign commission.

McLennan v. Helps, 193.

GARNISHEE PROCEEDINGS.

A garnishee order granted by the Court, on an application in Chambers, is regular.

Robertson v. Grant, 331.

INFANTS.

See "Costs," 10–13.
"Next Friend."
"Sale."

INSOLVENCY.

See "Partnership," 1.

INSOLVENT ACT.

[DOUBLE PROOF.]

The doctrine against double proof applies only when both estates are being administered in insolvency. A creditor, who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased, who has separately endorsed the note.

Re Baker, Bray's claim, 499.

INTEREST.

Interest held to be allowable, on a preferred debt consisting of drafts and promissory notes from the date until paid, and pending suit.

City Bank v. Maulson, 334.

INTERPLEADER.

Two writs were in the hands of the sheriff, and while an interpleader order was pending he was served with a notice to return one of the writs: and not having done so an application was made to compel him to make a return. Under the circumstances the Secretary enlarged the time for making the return, and made no order for costs.

It is the sheriff's duty, before making application for an interpleader order, to make some inquiry as to the nature of the claim, and if he has not done so, he will be ordered to pay costs.

Where an interpleader order is pending, the Court will in its discretion enlarge the time for returning writs in the sheriff's hands.

Walker v. Niles, 59.

See "Staying Proceedings," 2.

ISSUE.

[DIRECTING ISSUE.]

See "Practice," 1.

JURISDICTION.

1. This Court has no jurisdiction in a case involving a less sum than £10.

Where the Referee dismissed a bill on the ground that the amount involved was only $24, his order was sustained by the Court in rehearing term

Gilbert v. Braithwait, 413.

2. Where the amount of a legacy had been paid into Court, and the will directed that the legacy, together with a house and lot also devised to the same person, should be held for the benefit of the legatee independently of her husband, she receiving the rents, interest, and profits: on a motion to have the money paid out, or that it might be invested in the purchase of a farm for the legatee's benefit: the Referee *held* it to be in the jurisdiction of the Court to make such an order, and granted the application as to the purchase of the farm, refusing it as to the paying the money to her absolutely.

Re Trusts of Turner's Will, Ex parte Seaton, 259.

See "Solicitor," 7.

LEAVE TO APPEAL.

1. The Court, although reluctant to shut out a party from the privilege of appealing, will not give leave to appeal after a long lapse of time, and where numerous sittings of the Court of Appeal have been held since the judgment.

Davidson v. Boomer, 375.

2. To obtain leave to appeal after the time for appealing has elapsed, the party applying must shew "special circumstances."

Although the time for appealing counts from the date of the original decree, where a cause has been reheard, and the decree affirmed; yet, the fact that a cause has been reheard, will be taken into consideration on an application for leave to appeal after the time has expired.

A party's poverty is not of itself a sufficient excuse for delay, although the Court will not exclude it from consideration, but it will receive such a plea with caution.

Duff v. Barrett, 318.

3. Where a defendant intended to appeal from a decision within the year allowed for the purpose; but deferred appealing at once in order to ascertain the result of a reference: and the time for giving notice was allowed to pass by a mistake of his solicitor, who resided in Ottawa, and erroneously supposed that he had a year to give the notice; the Court gave leave on special terms to appeal for the following Court.

Butler v. Church, 91.

LIEN.

1. In a suit to wind up a partnership, the plaintiff's solicitor carried on proceedings till a decree was obtained and some progress made with the reference thereby directed. The plaintiff then became embarrassed, proceedings were stayed for a few months, and plaintiff at length assigned to a creditor in whose name acting by another solicitor, the suit was revived and a sum was ultimately found due to him. *Held*, that the solicitor of the original plaintiff had not lost his lien for costs, but was entitled to be paid, next after the satisfaction of the costs of the solicitor of the plaintiff who had conducted the suit to its conclusion out of the fund realized.

Clark v. Eccles, 324.

2. Under what circumstances lien held not to exist.

Brownscombe v. Tully, Re Fairbairn, 71.

LOCAL MASTERS AND REGISTRARS.

1. Local Masters and Deputy Registrars of the Court are not at liberty to practise in partnership with solicitors practising in this Court, although they may not actually share in the emolument of suits.

McLean v. Cross, 432.

2. On a motion to appoint a guardian, the Master should not appoint the plaintiff's nominee, but should select one of the

practitioners in the County Town, the one who seems best fitted on the whole for the duty, and appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants, and if no special reason exists for naming in preference some other solicitor.

Clements v. Arnold, 75.

LOAN OF MONEY IN COURT.

The Court will not grant a loan of money except to persons of undoubted credit, apart from the question of value of security offered.

Where the applicant was a young woman residing with her father, the application was refused.

Attorney-General v. Alexander, 101.

LUNATIC.

See "Administration," 4.

LUNATIC ASYLUM ACT.

On an application by the Bursar of the Provincial Lunatic Asylum for moneys in Court belonging to a lunatic party in a suit, in which his property had been sold, *Held*, that such application was not authorized by the statute: Con. Stat. U.C. cap. —

Mein v. Mein, 62.

MARRIED WOMAN.

See "Quieting Titles," 2.

MASTER AND MASTER'S OFFICE.

1. The Court will not interfere with the discretion of the Master in deciding on the relative veracity of witnesses, where evidence has been taken *viva voce* before him.

Where the Master refused to open a case where the evidence was closed, on the ground that the applicant had not made such a case as entitled him to a new trial at law, the Court sustained his ruling.

Waddell v. Smyth, 412.

2. Notwithstanding that a decree declares that the defendant "has accepted the title of the plaintiff," the defendant has a

right to object to a conveyance by the plaintiff alone if it appears that the legal estate is partly out of him.

Where it had been referred to the Master "to settle the conveyance or conveyances to the purchaser or purchasers, and all proper parties are to join therein, as the Master shall direct," and the Master did not, in settling the conveyance, direct that an infant, whose lands had been sold, should be made a party, but merely that her guardian should; and subsequently, after such infant had married, directed that she, being still an infant, and her husband should join in a new conveyance, which was done; it was held that this was within the Master's powers, and was in effect as if the Court had directed the execution of the conveyance under 12 Vic. ch. 72, and that the deed was binding and passed the estate.

Interest on purchase money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession, and a difficulty respecting the conveyance may justify his not taking possession.

Rae v. Geddes, 404.

3. A warrant should be so underwritten as to explain clearly what proceedings are intended to be taken under it; and if proceedings are taken of which the warrant gives no notice, or which are inconsistent with the underwriting, in the absence of parties interested, and who might if present have opposed them, such proceedings will be set aside and the benefit of them refused to the parties so irregularly proceeding.

Where a warrant was underwritten "to settle advertisement for sale of the balance of the unconverted assets of the estate," and without further warrant the Accountant directed that an offer for certain bonds of the estate be accepted, and the purchaser, a party interested under the will, made a profit on such purchase, the Master, upon the question being submitted to him, declared such profits of the sale to belong to the general estate.

Denison v. Denison, 349.

4. Practice defined as to the manner in which the Master will tax solicitor's costs for professional services rendered in the sale of lands and collection and transmission of the purchase money.

In Re Richardson, 144.

MORTGAGOR AND MORTGAGEE.

See "Production of Documents."

NEGLIGENCE.

See "Solicitor," 5.

NEXT FRIEND.

1. The test of the solvency of a next friend is, whether he is worth £100 over and above what will pay his just debts. If the allegation to such effect is uncontradicted, or the fact established by evidence, it is sufficient.

When on a motion to change a next friend on the grounds of insolvency, the next friend's own cross-examination shewed him worth the necessary amount, and no evidence to the contrary was adduced, the motion was refused with costs.

Stovel v. Coles, 421.

2. A *feme covert* plaintiff has a right to change her next friend without notice to the former next friend, and without giving him security for the costs already incurred. But notice to the opposite party is necessary, because the order for security is only given on condition of the antecedent costs of the opposite party being secured, if such a condition is desired by him.

Harvey v. Boomer, 11.

3. Where a married woman is a co-plaintiff with her husband who has a substantial interest in the suit, it is nevertheless necessary that the wife should sue by next friend.

Blackburn v. McKinlay, 65.

4. In the case of an infant plaintiff the Court will not require security for costs, or remove a next friend because he is not a person of substance.

A motion to remove a next friend of an infant, on the ground that, during the progress of the suit, he had become insolvent, was refused with costs.

Re McConnell, 423.

NOTICE.

The mere fact that certain creditors had notice of an assignment, without some act on their parts equivalent to an accession to the trusts in the deed, or such as would prejudice their rights, does not make the deed irrevocable.

Spooner v. Jones, 481.

See "Sale," 6.
"Security for Costs," 8.

ORDERS.

[ORDER OF COURT, DECISIONS UNDER.]

1. Where a subpœna had been sued out under Order 266, and an appointment thereunder given by a special examiner at a time when no motion or other proceeding was pending: It was held to be irregular, and that the depositions taken could not be read.

The attending under such a subpœna was held not to be a waiver of the irregularity, the objection being to the jurisdiction, which no waiver could confer.

Stovel v. Coles, 362.

[CON. ORDERS 390, 391, 392, 393.]

2. On receiving an abstract of title the purchaser has seven days within which to object to the completeness of the abstract, and after any question of its completeness is disposed of, and the abstract made perfect in the sense of being complete, seven days to object to the title; if, however, he takes his objection to the title in the first instance, the Master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title.

3. No objections other than those specifically taken, will be entertained by the Master.

4. The indorsed receipts for consideration money should appear in a perfect abstract, at all events as to deeds executed before the late Registry Act.

McManus v. Little, 263.

[ORDER 560.]

5. A motion for leave to appeal from a Master's report after the time limited has expired, need not be made before a Judge.

Russel v. Brucken, 488.

[ORDER 163.]

6. In computing the time for setting down a cause the day on which it is set down, and the first day of hearing are both excluded. There should fourteen clear days intervene.

Beard v. Gray, 104.

PARTIES.

1. In a foreclosure suit, the mortgagor being dead, one of his heirs-at-law, who was originally a defendant, appeared from

the affidavit filed to obtain service by publication to be dead, and the bill was thereupon amended by striking him out. The foreclosure was completed as against the other defendants, and after decree (on some objection to the title, by an intended purchaser, arising) a petition was filed by the plaintiff praying for an order foreclosing such party, and another party to whom one of the female defendants had been married and parted from, some fifteen years previously, and who had not since been heard of; the Referee refused the application.

Street v. Dolan, 227.

2. Where a bill had been filed against an alleged trustee for breach of trust, which it was stated in the bill consisted of the sale, and receipt by him of the proceeds of certain real estate, which by the terms of the trust he was to sell absolutely, and hold the proceeds on the trusts specified, *it was held*, that such a bill could only be sustained by the personal representative of the *cestui qui trust*.

3. A demurrer for want of equity to a bill by the next of kin was, in such a case, allowed with costs.

Allan v. Gamble, 105.

PARTNERSHIP.

1. This Court has jurisdiction, and will exercise it, to prevent a creditor of one partner obtaining an undue preference over the creditors of a firm by means of proceedings in this Court. Where, therefore, a purchaser at Sheriff's sale of the interest of one partner filed his bill for an account and a receiver, and the receiver obtained possession of the stock-in-trade; leave was granted to a creditor of the firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency when he should be appointed.

Felan v. McGill, 68.

2. Where a member of a partnership whose accounts the Master was directed to take, was by order made a party in the Master's office, but on subsequent enquiry it appeared that all liability on his part was barred by the Statute of Limitations, the Master, on the application of the party added, discharged his former order, holding that he was not a necessary or proper party, and that all partnership accounts required to be taken could be taken in his absence.

Kline v. Kline, 161.

See "Solicitor," 7.

PAYMENT OF MONEY OUT OF COURT.

Where a certain sum of money ordered to be paid to the plaintiffs under a decree had, pending a re-hearing and appeal, been paid into Court by arrangement between the parties, to obtain a stay of proceedings, in lieu of the security required by sub-sec. 4, of sec. 16, of the act relating to appeals: and on the appeal the decree was affirmed only in part, that part directing the payment of the money, being in part reversed by the amount being reduced to a comparatively small sum; a motion to pay out the money to the party who had paid it in was granted by the Secretary, though strenuously opposed, and his order was confirmed on appeal to the full Court.

Lindsey Petroleum Co. v. Hurd, 16.

POSSESSION.

See "Delivery of Possession."
"Quieting Titles," 5.

PRACTICE.

1. A Judge of the Court will, when it appears conducive to the interest of suitors, and a saving of expense, instead of directing an issue, himself try a question of fact arising on an application before him in Chambers.

Robertson v. Grant, 331.

2. In an administration suit, after delay on the part of the plaintiff, the conduct of the reference was given to a solicitor representing certain creditors of the estate. The plaintiff's solicitor, with the consent of the defendant's solicitor, but without notice to the solicitor of the creditors, or informing the Court that such solicitor had the conduct of the reference, applied in Chambers, and obtained an order to change the venue from Goderich to Stratford. Such order was on application set aside with costs.

McConnell v. McConnell, 122.

3. Where a party seeks to set aside a proceeding on technical grounds, his own case will be judged *strictissime juris*; and if he moves on insufficient materials, he does so at his own risk, and the Court will not aid him.

4. The Court will not encourage the taking advantage of an error which is obviously a mere slip and does not mislead, and is not calculated to mislead.

5. Where a notice of hearing had been given, and by a mistake of the month it was for a day past, the Court allowed it to stand, putting the parties on terms as to costs, and changing the venue for the convenience of going to hearing.

6. Where such notice had been moved against before the Referee, and the affidavits failed to negative the receipt of any other notice, and the motion consequently was refused, but leave was given to renew it: *Held*, that the giving time to renew the motion was an unwise exercise of discretion, and that it was open to the Judge on appeal to ignore or reverse it.

Scott v. Burnham, 399.

PRIORITY.

See "Sale," 3.

PRO CONFESSO, NOTING.

A bill was filed impeaching a patent as having been obtained wrongfully; the defendants were the patentee and his vendee, who had not paid all his purchase money. The patentee answered denying the equity claimed; his vendee allowed the bill to be noted *pro confesso*: *Held*, that the plaintiff failing to establish his case against the patentee the bill should be dismissed against both defendants.

McDermott v. McDermott, 38.

PRODUCTION OF DOCUMENTS.

A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute.

Bell v. Chamberlen, 429.

Under an order to produce taken out by one defendant, other defendants have no right to compel production or inspection.

A motion for a further affidavit under such circumstances was refused with costs.

Seymour v. Longworth, 112.

See "Affidavit," 4.

PROPERTY AND TRUSTS ACT.

Section 33 of the Act to amend the Law of Property and Trusts, 29 Vic. ch. 28, which enacts that any person, after 31st

December, 1865, dying seised of land charged with the payment of any sum of money by way or mortgage, the heir or devisee shall not be entitled to have the mortgaged discharged out of the personal estate: *Held*, not to apply to cases where the land is charged with the performance of an obligation other than the payment of money.

In a case such as suggested where the statute was held not to apply:—It was considered no bar to the chargee's right to be paid out of the personal estate of the intestate, that he was himself heir-at-law of the intestate.

Slater v. Slater, 1.

PURCHASER.

See "Sale," 5.

QUIETING TITLES.

1. Where a Sheriff certified that he had not on a particular day any executions against the lands of a petitioner, it was *held* insufficient, and that he should have certified that he had not had any for the thirty days previous, and that the lands in question had not been sold under execution for the preceding six months.

When the County Treusurer certified that "there is no tax charged in his office against lot, &c," *held* insufficient, and that it should be shewn that the return of lands in arrear for taxes for the preceding year had or had not been made by the township Treasurer; also, that the county Treasurer's certificate should shew that the land had not been sold for taxes for eighteen months preceding its date.

Re Harding, 232.

2. A devise by a married woman of property which was her separate estate, but of which her husband had been in possession before 4th May, 1859, was held to be good.

Re Hilliker, 72.

3. In seeking to prove the existence and contents of a lost deed. the affidavit of the petitioner alone as to searches is not sufficient; the particulars as to searches, by whom made, where, and why there made, should be given, and such a case generally as would before a Court be sufficient to let in secondary evidence.

4. A memorandum made in a book by a party through whom the petitioner claimed, was *held* not to be evidence in favor of petitioner.

5. Where the petitioner seeks to establish title by possession the possession under which a title is claimed, must be uninterrupted possession and one of the land, and should be in accordance with the title set up.

Proceedings under the Quieting Titles Act will not be made a substitute for an action of ejectment, and a petitioner must therefore have substantially an estate in possession.

Re Bell, 239.

6. The first section of the Act for Quieting Titles Act, 29 Vic. ch. 25, does not apply to the case of a vendee who has contracted to purchase, but who has not completed his contract.

Where, under such circumstances, the vendee filed a petition without first obtaining the consent of the vendor, the Court, in the exercise of its discretion under the 2nd section of the Act refused to entertain the petition.

Re J. G. Brown, 158.

7. A certificate granted *ex parte* on a false affidavit was set aside with costs, notwithstanding the contention that the notices as to the service of which the false allegation was made would not have been directed had the full facts been before the Court; the Court declining to enter into any question of merits.

Re Ashford, 77.

8. A petitioner claiming title by length of possession against the patentee of the Crown, failed to shew that the patentee or his heir had any knowledge of such possession. It was *held*. that he must shew a forty years possession, or such knowledge.

Re Linet, 230.

9. The certificate of counsel in support of a petition under the Quieting Titles Act should follow the language of the 8th section of the Act, and state to the effect that he has investigated the title, &c. A certificate of counsel that he had corresponded with the agent of the petitioner on the subject of the various matters set forth in the petition, and believed them to be true, was *held* to be insufficient.

The schedule of particulars referred to in the petitioner's affidavit should be identified by the Commissioners in like manner as any other exhibit.

Re Dickson, 352.

RECEIVER.

See "Partnership," 1.

REFERENCE.

See "Practice," 2.

REHEARING.

1. A vacancy occurring on the Bench was deemed a sufficient reason for not rehearing at the first rehearing term after the decree drawn up; and the time was on application extended.

Romanes v. Fraser, 53.

2. Where it was shewn that a decree not enrolled, which had been pronounced in 1855 was clearly erroneous, an order was made for rehearing the cause notwithstanding the lapse of time.

Cameron v. Wolfe Island Canal Company.

3. A motion for leave to rehear, notwithstanding more than six months will have elapsed from the date of the decree before the then next hearing term, was granted, where it appeared that judgment had been given but a short time previous to the last rehearing term.

Fleming v. Duncan, 53.

See "Practice," 6.

REPLICATION.

Where a replication was filed several years after the filing of the answer by a different solicitor from the one who had filed the bill, but no order changing the solicitor had been taken out, and no notice of filing replication given, the replication was ordered to be taken off the files, and the bill dismissed.

Rathbun v. Hughes, 160.

SALE.

1. Under the Statute authorizing the sale under execution of the mortgagee's equity of redemption, Consol. Stat, chapter 22, the sheriff cannot sell or convey any interest, if there is a second mortgage outstanding in the hands of different parties.

Where a first mortgagee acquired, as he contended, a title through a purchaser at sheriff's sale of the equity of redemption of the mortgaged premises, there being mesne incumbrances it was held that he did not acquire the fee in the lands, the sheriff not having power to sell.

Re Keenan, 285.

2. After a decree for foreclosure, the defendant applied in Chambers for an order for sale, the property mortgaged being worth $1:00, and the mortgage being for $[illegible]; and that the sale should not take place [illegible] Secretary considered the General Order imperative, and refused the application.

Thompson v. Macauley, 111.

3. Where a party purchased at a sheriff's sale under a judgment which had been registered before the registry of certain mortgages on the lands, although the mortgages had been made before, it was held that the purchaser took priority and absolute in fee.

Montgomery v. Shortis, 69.

4. Under a decree for the sale of land or a competent part thereof, it is the mortgagee's duty to see to the [illegible] and if the land is [illegible] the mortgagee consents that the whole should be sold, [illegible] the property at the time of sale by the above method, and it should be stated in the advertisement that the lands will be withdrawn from sale when the debt is paid, and that course is intended to be taken.

The confirmation of a sale may be opposed before the Master, and the sale should not [illegible] without a [illegible] in writing as to the sale.

Where the confirmation of a sale is opposed on the grounds [illegible] an unnecessary number of lots sold, the purchaser should be [illegible].

Semble, the objection [illegible] and he [illegible] purchaser, which [illegible] the confirmation of the report of sale.

Berry v. Rademaker, 344.

5. Where in a reference granted at the instance of a purchaser under a decree, the Master had called in evidence a new sale by way of confirmation of the sale, and that the evidence adduced at a second sale should be received as to have validated, and he [illegible] that after an interval [illegible] the [illegible] should not [illegible] the grounds of delay.

Dudley v. Berry, 51.

6. An application [illegible] sale by Master, to [illegible] sale [illegible] at any stage of the proceedings.

Where an order setting a sale [illegible] weeks was granted on the day the sale was to take place, and the Registrar mis-

graphed to the Master conducting the sale that such order was granted, and the message reached him after the sale, but before payment of the purchase money; an order made by a Judge in Chambers, refusing an application to set aside the sale was sustained by the full Court on rehearing.

The Freehold Permanent Building Society v. Choate, 440.

7. A petition had been presented for the sale of an infant's estate, fifty acres of lands, which produced $700 and upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the Court, on which it seemed to be intended the father of the infant—a farm labourer—was to reside with the infant; the Referee refused to sanction the sale.

The circumstances under which such sanction would be given, considered.

Re Mason, an Infant, 426.

SECURITY FOR COSTS.

1. Security for costs will not be ordered to be given where a defendant has obtained further time to answer.

Arthur v. Brown, 396.

2. An order directing security for costs to be given should name the sum for which the bond for security is to be given.

3. An application for an order for security for costs may be made after the expiry of the time for answering.

4. The fact that the defendant's solicitor knew that the plaintiffs had lands in the Province when he took out the order for security for costs, was *held* a good ground of objection to the order.

5. An objection that the copy-order served, was not endorsed with the name and place of business of the solicitor serving it, was overruled, it not being shewn to have been the first proceeding taken by him.

6. On the plaintiff's shewing that he had lands in the Province worth $4,000, an order for security for costs obtained *on præcipe* was set aside, and the order being also irregular in form, it was set aside with costs.

Ganson v. Finch, 296.

7. The practice as to the perfecting of security to stay execution on appealing from this Court is different from the practice on appeals at law. No motion is necessary here to

2. After a decree for foreclosure, the defendant applied in Chambers for an order for sale, the property mortgaged being worth $1000, and the mortgage being for $157; and that the usual deposit might be dispensed with. The Secretary considered the General Order imperative, and refused the application.

Thompson v. Macauley, 111.

3. Where a party purchased lands at sheriff's sale under a judgment which had been registered before the registry of certain mortgages on the lands, although the mortgages had been made before, it was *held* that the purchaser took priority and an estate in fee.

Montgomery v. Shortis, 69.

4. Under a decree for the sale of land or a competent part thereof, it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and if the mortgagor considers that too much is offered he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that the unsold lots will be withdrawn from sale when the debt is realised, if that course is intended to be taken.

The confirmation of a sale may be opposed before the Master, and the sale disallowed on grounds which would afford material for a motion to set aside the sale.

Where the confirmation of a sale is opposed on the grounds of there having been an unnecessary number of lots sold, the purchaser should be notified.

Semble, the objection will not prevail against an innocent purchaser, when urged against the confirmation of the report on sale.

Beaty v. Radenhurst, 344.

5. Where on a reference granted at the instance of a purchaser under a decree, the Master had found him entitled to a less sum by way of compensation for delay, &c., than the evidence appeared at a subsequent stage of the proceedings to have warranted, and he applied for further relief after an interval of eleven months, the Court refused the application on the ground of delay.

Dudley v. Berczy, 81.

6. An auctioneer, acting under an order for sale, or Master, or other officer conducting such proceedings, is not bound by an order staying the sale, of which he has not notice.

Where an order staying a sale for three weeks was granted on the day the sale was to take place, and the Registrar tele-

graphed to the Master conducting the sale that such order was granted, and the message reached him after the sale, but before payment of the purchase money; an order made by a Judge in Chambers, refusing an application to set aside the sale was sustained by the full Court on rehearing.

The Freehold Permanent Building Society v. Choate, 440.

7. A petition had been presented for the sale of an infant's estate, fifty acres of lands, which produced $700 and upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the Court, on which it seemed to be intended the father of the infant—a farm labourer—was to reside with the infant; the Referee refused to sanction the sale.

The circumstances under which such sanction would be given, considered.

Re Mason, an Infant, 426.

SECURITY FOR COSTS.

1. Security for costs will not be ordered to be given where a defendant has obtained further time to answer.

Arthur v. Brown, 396.

2. An order directing security for costs to be given should name the sum for which the bond for security is to be given.

3. An application for an order for security for costs may be made after the expiry of the time for answering.

4. The fact that the defendant's solicitor knew that the plaintiffs had lands in the Province when he took out the order for security for costs, was *held* a good ground of objection to the order.

5. An objection that the copy-order served, was not endorsed with the name and place of business of the solicitor serving it, was overruled, it not being shewn to have been the first proceeding taken by him.

6. On the plaintiff's shewing that he had lands in the Province worth $4,000, an order for security for costs obtained *on præcipe* was set aside, and the order being also irregular in form, it was set aside with costs.

Ganson v. Finch, 296.

7. The practice as to the perfecting of security to stay execution on appealing from this Court is different from the practice on appeals at law. No motion is necessary here to

allow the security: the onus of moving against the security being on the party objecting to it.

Heenan v. Dewar, 199.

8. On a motion for a stay of execution pending an appeal it is not necessary to give fourteen days' notice. The ordinary notice is sufficient.

Heenan v. Dewar, 199.

9. *Held*, qualifying *McBean* v. *Lilley*, 2 Cham. R. 247, as the decision in that case is stated in the head note, that the affidavit of a next friend that he is worth $400 over and above all his debts, is only *prima facie* proof of his sufficiency as a next friend, and that evidence as to his circumstances may be given.

10. Where evidence contradictory to the affidavit was adduced, which in the opinion of the Court outweighed this statement, security or a new next friend was ordered.

Walker v. Walker, 273.

11. Where a defendant had by answering waived his right to security for costs, and the plaintiff assigned his interest in the mortgage, the subject of the suit, to a party resident out of the jurisdiction; It was *held*, that the defendant was entitled to security for costs against the new plaintiff.

12. The fact that the suit was a foreclosure suit, was *held* not to disentitle the defendant to the order for security against the plaintiff, although a mortgagor, he disputing that anything was due, and the master being directed to inquire "what, if anything was due."

Thompson v. Callagan, 15.

13. The claimant, under an interpleader issue, if out of the jurisdiction, is bound to give security for costs.

Walker v. Niles, 108.

SEQUESTRATION.

1. When a sequestration had issued to compel payment under a decree, and there appeared to have been considerable delay in enforcing the payment of rents, during which period the defendant had died, and one of his heirs had received sundry sums for rent, a motion that such rents be paid over again to the sequestrators by the tenants was refused, and the tenants ordered to attorn as to future rents only.

Harris v. Meyers, 107.

2. *Held*, that sequestrators can lease for any period during which the rents would be less in the aggregate than the amount for which sequestration issued.

Harris v. Meyers, 89.

3. Where a sequestration to compel the performance of a decree had been issued against a person who subsequently died. *Held*, that the writ could be revived against his heirs.

Semble, That sequestration issued on mesne process cannot be revived.

Turley v. Meyers, 102.

SERVICE.

The Court will not order service by publication of parties out of the jurisdiction who cannot be found, on the affidavit of the plaintiff alone.

——— v. Corcoran, 398.

SOLICITOR.

1. Where an order for the delivery and taxation of bills of costs had been taken out on *præcipe* on the application of the administrator of the person who employed the solicitor, and the fact that the solicitor disputed the retainer by such person, was not brought to the notice of the Court on the issuing of the order, but it was established that the administrator did not know when taking out the order that the retainer was disputed: *Held*, that there was no suppression of a material fact on the part of the administrator, and that the order was regular.

2. The Court will *sua sponte* where the circumstances appear to warrant it, take notice of the conduct of its solicitors, and investigate matters in which their acts seem open to suspicion.

3. Where witnesses directly contradict each other, the presumption is, not that one speaks falsely, but that one has forgotten the circumstances, unless the facts distinctly repel such an assumption. In investigating a charge instituted by the Court against a solicitor, and which if established would have proved of a very grave nature, the Court acted on the above principle and accepted the solicitor's explanation of the facts, although distinctly contradicted by the client.

In re Toms, a Solicitor, in the matter of M. C. Cameron, 204.

4. An agreement entered into by a solicitor that his client's suit should abide the event of a certain other suit by the same plaintiff against another party, such agreement being made

without instructions from the client, who afterwards repudiated it, *held*, not to be binding on the client.

Dewar v. Orr, 224.

5. Where a solicitor incurs useless and unnecessary costs by instituting a suit in the Court of Chancery in respect of a subject matter within the jurisdiction of the County Court, the surplus of the costs in Chancery over the Inferior Court tariff will not be allowed to him against his client.

6. Where in a suit brought as above the costs in Chancery had been disallowed *in toto* between the parties, the Master allowed the plaintiff's solicitor County Court costs, the client having through the exertions of his solicitor derived some benefit from the suit.

Re Hardy—Poole v. Poole, 179.

7. Mortgages were delivered to a solicitor by his brother for collection, and the money was collected thereon. A dispute arose as to whether such solicitor was alone responsible to his brother, or whether the solicitor's partner was responsible also for the moneys collected. On petition of the client for payment of the money, the Court refused to make an order against the partner, holding that the petitioner should be left to bring a suit at law or in equity as he might be advised.

In re Toms & Moore, Solicitors, 41.

8. Where a solicitor had been appointed by the Master to represent certain creditors as a class, and one of such creditors, in an affidavit filed by him, repudiated the act of such solicitor: *Held*, he was bound by the solicitor's proceedings.

Held, further, that the solicitor was not only authorized to act for such creditors in the proceedings in the Master's office, but also in proceedings arising out of or connected with these, —such, for instance, as a motion in Chambers on their behalf.

Re McConnell, 423.

See "Lien."

STATUTE OF LIMITATIONS.

The Court will not relieve a party against the effect of one lapse of time in order to enable him to set up another lapse of time against creditors; where, therefore, a party applied for leave to appeal after the time for appealing, [or for giving notice thereof] had expired, in order to enable him to set up the Statute of Limitations against certain creditor's claims, the Court refused the application.

Brigham v. Smith, 313.

Before the passing of the Act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee, and gave up possession to the purchaser: *Held*, that the Statute of Limitations did not begin to run until the death of the grantor.

Re Shaver, 379.

See "Parties."

SUMMARY JURISDICTION.

See "Solicitor," 7.

STAYING PROCEEDINGS.

1. The Court will not, as a matter of course, stay proceedings pending a rehearing. It is in the discretion of the Court to stay, or refuse to stay, proceedings; and the Court will impose terms according to the circumstances of each case, granting a stay more readily than formerly, if it be shewn that there is a danger of loss unless proceedings be stayed.

2. Where in an interpleader suit a large sum of money was ordered to be paid over to a claimant resident in the United States, and the plaintiff who proposed to rehear, and had made his deposit, asked to have proceedings stayed; the claimant was directed to give security to abide by any order the Court might make upon the rehearing, and to repay the money if so directed, before the money was ordered to be paid to him.

Walker v. Niles, 418.

3. An application to stay proceedings pending an appeal from an order overruling a demurrer, is to the discretion of the Court.

4. Where allowing plaintiff to proceed would so prejudice the defendant as virtually to defeat the appeal, proceedings will be stayed, but where defendant fails to shew that he would be prejudiced, a stay will be refused.

5. In a case where the stay moved for was refused, the Court ordered that any answer put in should be without prejudice to the appeal from the order overruling the demurrer.

McMurray v. Grand Trunk Railway Company, 125.

6. A motion to stay proceedings pending an appeal, may properly be made, although no petition of appeal has yet been filed.

But the party applying for a stay must be in a position to appeal. Where, therefore, a party seeking a stay, pending an appeal from an interlocutory order, applied; when it had become too late to give notice and get in his appeal within six months, the application was refused.

Brigham v. Smith, 313.

7. Where a former action of ejectment had been brought and decided on the merits, and no real or probable cause of suit was sworn to in the suit moved in; an order was granted to stay proceedings until the costs of the action of ejectment were paid.

Ostrander v. Ostrander, 50.

See "Security for Costs," 7.

STYLE OF PROCEEDINGS.

The proper style of proceedings in a matter of a solicitor is in the matter of the solicitor only, without the style of any cause.

Scott v. Burnham, 467.

SUBPŒNA.

Before a subpœna will be issued to the Province of Quebec, it is necessary to shew that no suit is pending in that Province for the same cause of action.

McPherson v. McPherson, 58.

To compel the attendance of a witness, or a party whom it is sought to examine, he must be duly subpœnaed or served with an appointment eight days previous to an examination.

A subpœna should not be dated prior to the time at which the party taking out such subpœna is entitled to examine the party or witness served with subpœna.

Where a party plaintiff in a cause had been served with a subpœna dated before he was regularly liable to examination—a môtion to commit him or dismiss his bill, was refused, but without costs.

McMurray v. Grand Trunk Railway Company, 180.

See "Orders."

TAXATION.

See "Costs."
"Master's Office," 4.

TECHNICAL OBJECTION.

See "Practice," 3, 4.

TIME.

Motion before a Judge to set aside an order to revive was *held* to be too late after the lapse of fourteen days.

But under the the circumstances the Court granted an enlargement of the time.

McIlroy v. Hawke, 66.

TITLE.

Where a deed had been made in trust for creditors to a party who afterwards reconveyed to the grantor, some of whose creditors had been informed of such assignment having been made, but had done no act to alter their position in any way, and the land was afterwards sold for taxes; it was *held*, that the deed of assignment was revoked and did not affect the title

Spooner v. Jones, 481.

TRUSTEES.

A trustee is bound to exercise a prudent supervision over the acts of an agent, or a co-trustee appointed or acting as agent or manager, for his co-trustee; and where he neglects this duty, he makes himself liable for losses occurring through the acts of such agent or manager.

But a trustee in this position was not *held* liable for moneys received by the agent or co-trustee acting as manager, which were not entered on the books (to which the trustee charged had access) and which he could not have discovered by any vigilance he might have used.

A trustee is liable for the acts of an agent in whose appointment he has concurred, and whose defalcations would have been discovered by an ordinary inspection of the books kept by him.

City Bank v. Maulson, 334.

Where compensation was given to trustees by the trust deed, not in a lump sum, and they had failed in some points of their duty, the Master did not consider that he could deprive them of compensation; but he *held* that he could determine on the value of the work done, and make a corresponding allowance.—*Ib.*

VENUE.

See "Changing Venue.

WAIVER.

See "Security for costs," 1.

WARRANT, PROCEEDINGS ON.

See "Master's Office," 3.

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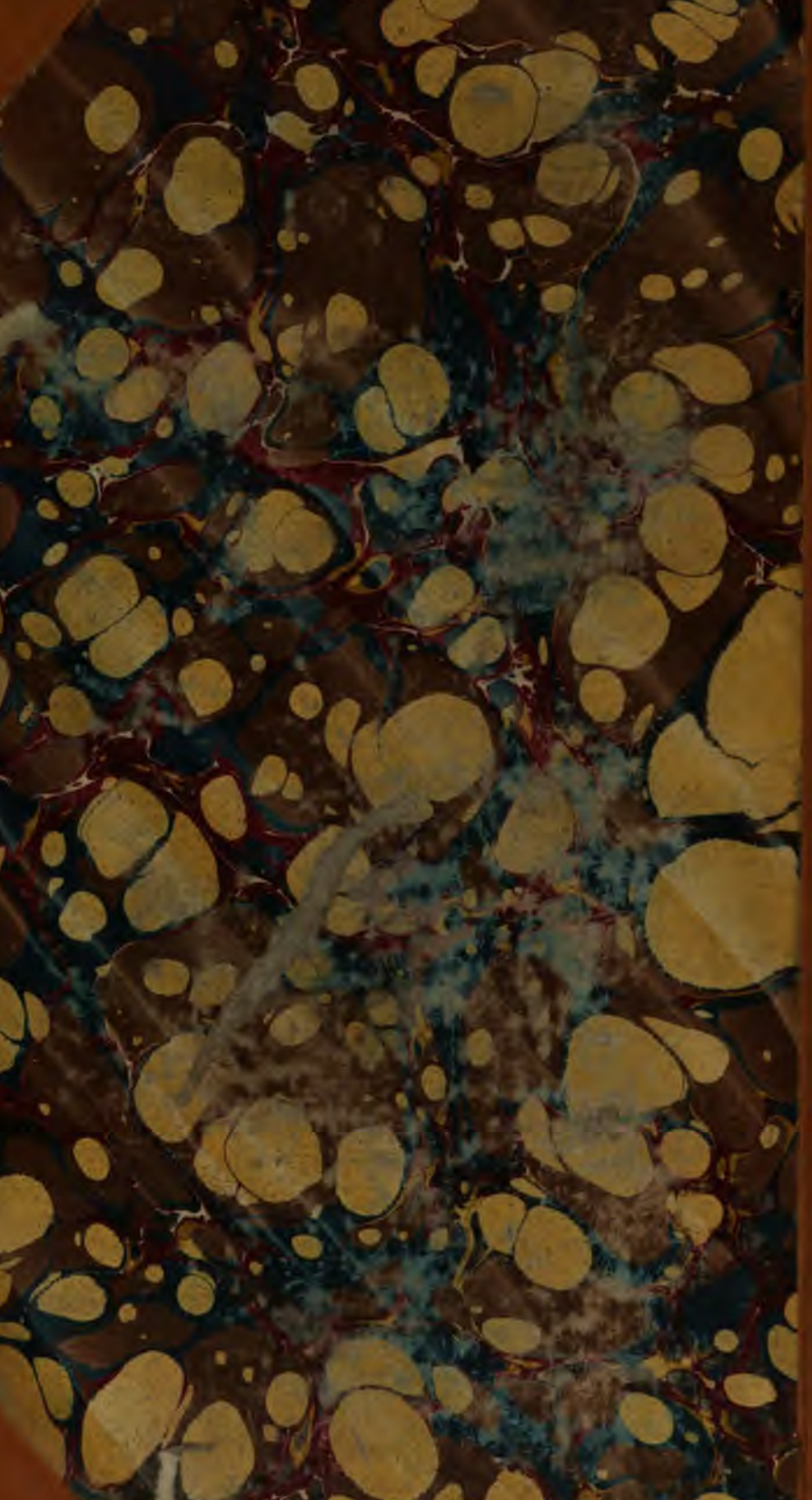
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